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A RESPONSE TO THE CRITICS

OF

JUDGE ROBERT H. BORK

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EXECUTIVE SUMMARY

A detailed analysis of recent critical reports on Judge Bork shows a pattern of distortion and error that cause them seriously and systematically to misstate his record and views.

- The statistical reports exclude his unanimous decisions -- more than 85% of his cases -- concentrating on a small, unrepresentative sample.

- The reports ignore that Judge Bork has been in the majority in 95% of the cases he has heard.

- The reports dismiss Judge Bork's perfect record of nonreversal in the Supreme Court: not one of the more than 400 opinions that he has authored or joined has ever been reversed. They claim it is "uninformative" because the Supreme Court has never reviewed an opinion he has written. But:

  -- The Supreme Court has reviewed opinions he has joined and and has always affirmed them;

  -- The Supreme Court has reviewed six of the 20 cases in which Judge Bork filed dissenting opinions, and agreed with Judge Bork's dissent in all six.

  -- The Court's repeated rejection of petitions to review Judge Bork's other opinions shows his consistent excellence, since the Court grants review principally to correct error.

- The reports employ an arbitrary and misleading methodology, use evidence in a highly selective manner, and tend distressingly toward inflammatory mischaracterization. The reports persistently and flagrantly distort the small sample of cases they address:

  -- Public Citizen describes one case in which Judge Bork ruled for a labor union and against a federal agency as "pro-business," because unions are "in the business" of representing workers.

  -- Judge Bork's important and expansive decisions upholding First Amendment freedom of the press cases are caricatured as "pro-business" because newspapers, radio stations, and other media are "businesses."

  -- Public Citizen describes a particular vote by Judge Bork in one section of its report as "pro-business" because the plaintiff's home was a ranch, but in another section as evidence of Judge Bork's slamming the courthouse door on the fingers of the same plaintiff's assertion of individual rights.

-- The reports twice characterize as "pro-business," cases in which Judge Bork was merely voting to shift costs among businesses.

-- The reports criticize him as being motivated by his own political agenda. Yet Judge Bork neutrally applies the law. For example, in a significant First Amendment opinion, Judge Bork voted against a conservative political action group.

o Failing to heed Democratic appointee Judge Harry Edwards' admonition that "efforts to tag judges as 'liberal' or 'conservative' are fundamentally misguided," the reports insist on pinning labels on him. These reports also ignore the fact that Judge Bork has agreed with each of his Democratic appointed colleagues on the court between 75% and 91% of the time.

o Even the skewed and truncated sample of nonunanimous cases show that Judge Bork is a fair, mainstream judge:

-- Judge Bork was in the majority in fully 70% of those cases (39 of 56 decisions);

-- Judge Bork voted with a Democratic appointee in 47% of these cases (26 of 56 cases); and if one excludes his 14 panel dissents, he voted with a Democratic appointee 62% of the time;

-- In en banc cases, Judge Bork voted with Democratic appointees 92% of the time.

o Analysis of Judge Bork's entire record presents a more accurate picture:

-- The AFL-CIO finds Judge Bork "opposed to the claims of . . . labor," but ignores the fact that in 46 cases involving labor and workplace safety in which the outcome was unambiguous he voted for the union or employee 74% of the time (34 cases);

-- The ACLU says that if Bork is confirmed, "civil liberties in this country would be radically altered," but fails to note that in 7 of 8 civil rights cases Judge Bork voted for the claimant -- 88% of the time;

-- The Biden report refers to Bork's "extremely restrictive" view of the First Amendment, but doesn't mention that in the 14 First Amendment cases with unambiguous outcomes, Judge Bork voted for the party seeking First Amendment protection 43% of the time (6 cases).

- o Justice Scalia, unanimously confirmed last year by the Senate and widely acknowledged to be "in the mainstream of our society" (Senator Kennedy), voted with Judge Bork 98% of the time in the 86 panels on which they sat together on the appeals court.

  -- On one of the two occasions on which they disagreed, Judge Bork voted to afford greater constitutional protection than Judge Scalia; that case was Ollman v. Evans, the celebrated First Amendment case, in which Judge Scalia criticized Judge Bork for his liberal reading of the Constitution.

  -- Many of the Bork opinions most criticized in the reports as "extreme," like Vinson v. Taylor, Cyanamid Co., and Dronenburg V. Zech, were joined in full by Judge Scalia.

  -- Not one of the studies explains why Judge Scalia is in the mainstream, but Judge Bork is not.

- o Even Justice Powell's distinguished and fair-minded record on the Supreme Court can be manipulated and misrepresented as "extreme" by the defective statistical analysis employed by the studies:

  -- Using the spurious techniques employed by the reports, (1) over his career Justice Powell is seen to have voted against civil rights plaintiffs in 79% of all non-unanimous decisions decided while he was a member of the Court, and (2) in favor of business interests in 78% of nonunanimous cases during the past five years.

  -- This shallow statistical treatment of Justice Powell's record obviously obscures and distorts his evenhanded administration of justice over a long and distinguished career. But precisely the same is true of the distorted and misleading treatment by the studies of Judge Bork's record.

- o The Biden report erroneously claims that the Supreme Court disagreed with Judge Bork in Vinson v. Taylor, a sexual harassment case brought under Title VII.

  -- The Supreme Court in fact agreed with Judge Bork that evidence could be introduced to determine if the advance was "welcome."

  -- The Supreme Court also agreed with Judge Bork that the employer was not strictly liable for the conduct of its employees.

  -- Judge Bork assumed, and did not question, the applicability of Title VII suits to claims for sexual harassment.

- The Biden report claims that Judge Bork's opinion in Dronenburg represents "a novel approach to lower court constitutional adjudication."

  -- The report neglects to mention that the Supreme Court, in an opinion joined by Justice Powell, subsequently agreed with Judge Bork's conclusion that homosexual conduct is not constitutionally protected under a substantive due process rationale. See Bowers v. Hardwick.

- Justice Powell has stated the fundamental principle that judges hear no case that exceed "the proper -- and properly limited -- role of the courts in a democratic society." Yet the reports attack Judge Bork for denying access to parties who ask the courts to violate this constitutional limit on the judicial power.

- Judge Bork respects the law as a neutral set of rules, impartially applied to all people. In contrast, the special interests evaluate judges precisely the way that they rank politicians -- according to the number of times they deliver results desired by a particular special interest to further a political goal.

- Judge Bork's jurisprudence demonstrate his fairmindedness, commitment to the principle of judicial restraint, and respect for established legal precedent. The portrait of Judge Bork that emerges is that of an exceptionally able jurist in the mainstream of American legal tradition.

SUMMARY OF SIGNIFICANT STATISTICS

(1.) Of over four hundred cases in which he has been in the majority, Judge Bork has never been reversed by the Supreme Court. Thus in every such case, the Supreme Court has been content to leave intact Judge Bork's position as the law of the D.C. Circuit.

(2.) Judge Bork has been in the majority in over 95% of the 416 cases in which he has participated.

(3.) Of Judge Bork's 20 dissenting opinions, the Supreme Court has reviewed six and has adopted Judge Bork's position in each. The D.C. Circuit sitting en banc has reviewed one case in which he dissented, and the full court adopted his position.

(4.) In all but 14 of the 416 cases in which Judge Bork participated, or 96% of the time, at least one other appellate judge agreed with him.

(5.) Judge Bork has agreed with his liberal colleagues on the D.C. Circuit in a high percentage of cases.

(a.)	Ruth Bader Ginsburg	91%;	(b.)	Abner J. Mikva	82%;
(c.)	Patricia M. Wald	76%;	(d.)	Harry T. Edwards	80%;
(e.)	J. Skelly Wright	75%			

(6.) Justice Powell has agreed with the position taken by Judge Bork in nine out of ten, or 90%, of the instances in which opinions written or joined by Judge Bork have been reviewed by the Supreme Court.

(7.) The 56 nonunanimous cases examined in the Public Citizen Study amount to only 14% of the total cases in which he has participated. Of those 56 cases, Judge Bork was in the majority 70% of the time and he voted with a Democratic appointee 47% of the time. Excluding his panel dissents, Judge Bork voted with a Democratic appointee 62% of the time in nonunanimous cases.

(8.) Applying Public Citizen's spurious methodology, Judge Bork took the "liberal" position over 40% of the time in nonunanimous cases.

(9.) Judge Bork voted for the civil rights claimant in 7 of 8 substantive civil rights cases, or 88% of the time.

(10.) Considering all Judge Bork's cases using Public Citizen's techniques, Judge Bork voted in favor of unions or employees 74% of the time in 46 cases in which there was a clear outcome for either the union/employee or the employer. Judge Bork voted in favor of the first amendment claimant 43% of the time in the 14 cases decided unambiguously for or against a first amendment claim.

(11.) Under Public Citizen's spurious methodology, Justice Powell's fine record can be manipulated to show that, in the past five Supreme Court Terms, he voted for the business interest fully 78% of the time in nonunanimous cases, and that, during his entire career, he voted against the civil rights claimant 79% of the time in nonunanimous cases.

TABLE OF CONTENTS

INTRODUCTION

> Despite the reminder of Chief Justice Hughes that we ought not to expect much greater agreement on the difficult issues that come before the Court than we find in the higher realms of other intellectual disciplines -- science, theology, philosophy -- we complain that the Many have obscured the One, that Whirl is King, having driven out Zeus. When invited to specify, the bar can draw on statistical tables of division in the present Court, catalogued and tabulated with all the deadly precision of a score sheet. It then appears that there are sharp cleavages in the Court in two major areas of decision: the field of civil liberties and the field of application of federal regulatory law. How significant is the discord, and what factors explain it? Unless we look behind the statistical compilations, in which votes are necessarily taken as values, we shall be in danger of emulating those institutes of social studies that my colleague T.R. Powell once described as places where the counters don't think and the thinkers don't count.
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> Paul A. Freund, On Understanding the Supreme Court 1949

Judge Bork's judicial record has recently been the subject of a number of critical reports issued by consultants to Chairman Biden of the Senate Judiciary Committee and organizations like the American Civil Liberties Union, the National Women's Law Center, the Feminist Men's Alliance, Ralph Nader's Public Citizen Litigation Group, and the AFL-CIO. These studies employ somewhat different methodologies, and several of them focus on specific issues of concern to the interest groups issuing them. Nevertheless, they share overarching flaws: an arbitrary and

misleading methodology, highly selective use of evidence, and a distressing tendency towards inflammatory mischaracterization.

The combination of these defects invalidates the conclusions reached by these surveys and results in serious distortions of Judge Bork's record as a scholar, Solicitor General, and appellate court judge. In addition, these defects are reflective of the authors' views of jurisprudence. The reports' narrow focus on the identities of litigants, rather than legal issues and analysis, reveals more about these interest groups' views of what the law should be, than it does about Judge Bork and the law as it exists today. Those who respect the law as a neutral set of rules, impartially applied to all people, assess a judge's performance by examining whether his legal analysis evinces principled reasoning and fidelity to the laws as written. In contrast, those who view courts as simply another political playing field for competing special interests evaluate judges in precisely the same way that they rank politicians: according to the number of times they deliver results desired by a particular special interest to further a political agenda.

Regrettably, the sum total of these interest groups' criticism is simply that Judge Bork has failed to "deliver the goods" to them on a sufficiently uniform basis because he has committed the cardinal sin of neutrally discerning and applying the laws.

The following survey seeks to explain the serious flaws in the critical studies of Judge Bork and to provide a more balanced, detailed and accurate view of his jurisprudence,

enabling the reader to make an objective evaluation of Judge Bork's record. We are convinced that any reader who does so will conclude that Judge Bork is a distinguished, impartial judge, who follows in the tradition of the greatest jurists of this century in his integrity and respect for law.[1]

I. The Real Robert Bork

A. Overview

The most ironic charge made by Judge Bork's opponents is that he is not a true proponent of judicial restraint, but an "activist" judge seeking to implement a conservative political and social agenda. The irony derives from the fact that among legal scholars Judge Bork has long been known as the most eloquent, consistent and brilliant exponent of the classic theory of judicial restraint. No one either in or out of government has more cogently affirmed that the only political or social policies

[1] The reports to which we respond are: Memorandum on Judge Robert H. Bork's Academic Writings and Judicial Opinions and Positions Taken By Judge Bork in Non-Unanimous D.C. Circuit Decisions ("Positions Taken Memo") by the AFL-CIO (the "AFL-CIO"); Report on the Civil Liberties Record of Judge Robert H. Bork, by the American Civil Liberties Union (the "ACLU"); Response Prepared to White House Analysis of Judge Bork's Record, by consultants to Chairman of the Committee on the Judiciary Joseph R. Biden, Jr. ("Biden Report"); the so-called Columbia Law Review Study of Judge Bork's Votes in Cases With Dissents, by two students at the Columbia University School of Law (the "Students' Report"); The Judicial Record of Judge Robert H. Bork, by the Public Citizen Litigation Group ("Public Citizen"); and Setting the Record Straight: Judge Bork and the Future of Women's Rights, by the National Women's Law Center (the "Womens' Center"). Three of these reports -- by Public Citizen, the Students and the AFL-CIO -- employ a particularly suspect methodology. Each focuses on an extremely limited sample of Judge Bork's cases -- his votes in non-unanimous cases only -- and categorizes those cases according to "winners" and "losers," ignoring the issues and analysis. This report will focus on rebutting their mischaracterizations. The response to the other reports is included in the general discussion of Judge Bork's philosophy and

which a judge should implement are those policies chosen by the framers of the relevant constitutional or statutory provision. As Judge Bork recently put it

> In a constitutional democracy, the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge . . . . That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.

Tradition and Morality in Constitutional Law, Francis Boyer Lecture, (AEI) at 11 (1985) ("Boyer" Lecture).

One strong proof of this is that Judge Bork has repeatedly spoken out against politically "conservative" measures or doctrines that stand on an unsound constitutional footing. For example, he has opposed "substantive due process," whether used by courts as a vehicle to create new constitutional privacy rights or, as some conservative scholars would have it, to create new constitutional economic rights:

> As Judge Learned Hand understood, economic freedoms are philosophically indistinguishable from other freedoms. Judicial review would extend, therefore, to all economic regulations. The burden of justification would be placed on the government so that all such regulations would start with a presumption of unconstitutionality. Viewed from the standpoint of economic philosophy, and of individual freedom, the idea has many attractions. But viewed from the standpoint of constitutional structures, the idea works a massive shift away from democracy and toward judicial rule.

Bork, Economic Rights, 23 San Diego Law Rev. 823, 829 (1986). Other examples are his testimony against the Human Life Bill, the

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[1] (Cont.) judicial opinions.

most sustained effort yet in Congress to overrule Roe v. Wade. He has publicly opposed efforts to strip the courts of jurisdiction over conservative "social issues." He has stated that the expansive interpretations of the Commerce Clause adopted in the 1930's had become part of the social and political fabric of the Nation. None of these positions would be taken by an activist conservative ideologue.

Similarly ill-founded is the contention that Judge Bork is a radical extremist who will persuade the Supreme Court to abandon fundamental civil liberties. How could Judge Bork be both the extremist rightwing ideologue depicted in these reports and the man who would simultaneously alter the balance of the Supreme Court? Only if the block of justices who would vote with him are also "extremist rightwingers" could this be true -- meaning that in the view of these reports a bloc of almost one-half the Supreme Court today is already "extremist" and "rightwing", presumably including one Justice (White) appointed by President Kennedy and two Justices (O'Connor and Scalia) unanimously confirmed by the Senate.

Moreover, every "controversial" jurisprudential theory endorsed by Judge Bork and attacked by his critics as extreme has been strongly supported by such eminent and mainstream jurists and scholars as Frankfurter, Black, Harlan, and Bickel. Nor are Bork's only affinities with jurists of the past. He has been in the majority of his own court in 95% of all cases, and none of the almost 400 majority opinions he has authored or joined has ever been reversed by the Supreme Court. Indeed, though Judge

Bork is rarely in dissent, his dissents have been extremely persuasive: the Supreme Court has repeatedly adopted his reasoning over that of panel majorities, while his own majority opinions have gone unreversed. An extremist simply could not have such a record.

It is also important to remember that Judge Bork's alleged extremism consists not of substituting his judgment for the legislature's but of deferring to the people's elected representatives more than his critics would like. It is ironic that some Senators profess to be horrified by the legal views of a judge whose basic commitment is deference to elected representatives.[2] Hodding Carter has candidly stated that Judge Bork's nomination

> forces liberals like me to confront a reality we don't want to confront, which is that we are depending in large part on the least democratic institution, with a small "d," in government to defend what it is we no longer are able to win out there in the electorate.

This Week with David Brinkley, July 5, 1987, Tr. at 13.

As we shall see, this principle of self-government by the people is precisely and exclusively what Judge Bork's opponents fear. The record demonstrates that he will neutrally apply the values chosen by elected representatives in the area preserved by the Constitution for democratic choice, but will uncompro-

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[2] Another measure of Judge Bork's judicial philosophy is provided by Chairman Biden himself, who in voting to confirm Justice Scalia stated that he would in no way "unravel the settled fabric of constitutional law." 132 Cong. Rec. S12833 (daily ed. Sept. 18, 1986). Justice Scalia voted with Judge Bork in 98% of the cases on which they sat together on the U.S. Court of Appeals, including some of Judge Bork's most controversial decisions.

misingly defend any values actually embodied in the Constitution itself.

B. The Spurious Methodology

The Public Citizen,[3] Students, and AFL-CIO reports all present statistical compilations that purport to reflect Judge Bork's performance on the bench. From these statistics, each report either concludes or strongly implies that "Judge Bork's performance on the D.C. Circuit is not explained by the consistent application of judicial restraint or any other judicial philosophy." (Public Citizen, at 3) Nothing in these reports supports this assertion. The statistical compilations in the reports use an unrepresentative sample of cases, unscholarly and unprofessional principles of categorization, and misleading present and inaccurate characterizations of decisions. These errors and inaccuracies render the reports virtually worthless for purposes of evaluating Judge Bork's record.

1. The selection of cases is arbitrary and unprincipled.

The fundamental flaw in all of these reports is their exclusive focus on Judge Bork's nonunanimous or "split" decisions.[4] These cases amount to little more than ten percent of Judge Bork's votes on the D.C. Circuit. Such a limited and arbitrary sample is clearly an inadequate basis for a considered judgment. First,

[3] Our citations are to Public Citizen's initial release, not its Published Report.

[4] An initial problem is that it is by no means clear in all cases what is meant by "split decisions." Each of the three reports employing this method applied it to a different number of cases. The AFL-CIO report identified 67 so-called non-unanimous cases, in part because it considered in its statistics cases on which Judge Bork expressed an opinion but was not on the panel. The

there simply is no support for the assumption that clear legal outcomes are mandated in unanimous cases. As Judge Henry Friendly wrote in commenting on an article analyzing the voting habits of all judges on the federal courts of appeals from 1965 through 1971, "[i]t simply is not true . . . that the other 94 percent [the unanimous cases] could have gone only one way."[5] Similarly, as a scholar recently stated in the American Journal of Political Science:

> A recent criticism of the lack of serious analysis of unanimous decisions suggests that decisions with dissents are utilized so nearly exclusively largely for convenience sake.[6]

Because all three judges ultimately agree on an outcome simply does not mean that a case is not a difficult one. All three judges may struggle with an issue and independently conclude that one party should prevail. But this does not mean that the law is clear, or the decision easy.

Further, judges on a panel often have a synergistic effect on one another during their discussion and consideration of a case. Together they strive to make a decision. One judge may feel strongly about a particular case, or have greater expertise on the issues involved, or have developed an especially persuasive analysis, and thus convince the other two judges who

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[4] (Cont.) Public Citizen report included 56 cases in its statistics, and the Student's report counted 52 votes in such decisions.

[5] Friendly, Of Voting Blocs, and Cabbages and Kings, 42 U. Cin. L. Rev. 673, 673 (1973).

[6] Songer, Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals, 26 Am. J. Pol. Science 225, 226 (1982).

were prepared to vote the other way that he is correct. Any one judge's vote can, and often does, in any case -- unanimous or not -- "make a difference in the outcome."

Second, the relationship between controversial cases and split decisions is essentially coincidental, for the three-judge panels are chosen randomly. The proof of this is that some of the reports' statistics do not include Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), where Judge Bork decided that a homosexual naval officer did not have a constitutionally-protected right of privacy under the fourteenth amendment. This is certainly one of Judge Bork's most controversial and important decisions, and is necessary to an intelligent understanding of Judge Bork's judicial philosophy. But, because it was decided unanimously, it did not fall into the sample analyzed by these reports, although a separate statement by four judges objecting to the decision strongly suggests that any one of them would have rejected Judge Bork's analysis there.[7]

Nor do the reports consider cases where a unanimous panel overruled a district court's decision. But the fact that an experienced trial court judge disagreed with the appellate panel is at least as reliable an indication of a case's difficulty as is disagreement among the panel members. Moreover, it makes no sense to collect eighteen decisions in which Judge Bork has joined the opinion of another judge without writing, and to add to those cases thirty-eight of the one hundred-fourteen that he

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[7] These judges joined in a statement dissenting from the denial of rehearing en banc in Dronenberg, 746 F.2d 1579 (D.C. Cir. 1984).

wrote. Thus, the sampling technique employed by these studies is unprofessional and arbitrary.

The effect of this technique, which capriciously dismisses almost ninety percent of Judge Bork's decisions as irrelevant, is to give the impression that the judges on the D.C. Circuit routinely render openly political decisions over which there is great contention and strife. Nothing could be farther from the truth. In his five years on the bench, Judge Bork has been in the majority fully 95 percent of the time. In addition, Judge Bork has voted with so-called "liberal" Judges Ruth Bader Ginsburg, Abner Mikva, Harry T. Edwards and Patricia Wald respectively, 91, 82, 80, and 76 percent of the time.

Judge Bork's colleagues on the bench have repeatedly repudiated the fiction of politicized voting. Judge Harry Edwards has written that "efforts to tag judges as 'liberal' or 'conservative' are fundamentally misguided," giving his broad agreement with Judge Bork on the bench as evidence of that fact. Edwards, Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit, 56 U. Colo. L. Rev. 619, 630-636 (1985). Chief Judge Patricia Wald has also criticized lawyers who "simplistically characterize" judges as "liberal" or "conservative". She advised them "not [to] try to handicap old myths about nonexistent feuds, or rumors about philosophical differences between us." Remarks of Judge Patricia Wald, 7 District Lawyer 39, 40 (July-Aug. 1983).

The so-called "split decisions" examined in Public Citizen's report make up at best only 14 percent of the decisions in which

Judge Bork participated. At least 86 percent of the decisions in which Judge Bork participated were unanimous. In other words, Judge Bork and his colleagues agreed on nearly nine out of ten cases. This alone refutes Public Citizen's claim that Judge Bork is a radical outside the mainstream of accepted legal scholarship. Moreover, of those 14 percent of "split decisions," in 39 out of 56 cases studied by Public Citizen, Judge Bork was in the majority. In fact, Judge Bork was in dissent in only 14 of 50 split decisions[8] -- in other words, in only 28 of percent non-unanimous decisions, or something less than 4 percent overall. Put another way, Judge Bork was three times as likely to be in the majority as in dissent in the almost 400 cases he participated in as a member of a three-judge panel.

2. Misleading Organization and Analysis

In addition to devoting its attention exclusively to only a small percentage of the cases in which Judge Bork participated, the reports further distort his record through misleading organization and analysis.

For example, the Public Citizen report claims to show that "Judge Bork sided regularly with management (either business or government) against labor."[9] However, Public Citizen's own facts belie any inference or conclusion that Judge Bork strayed outside mainstream jurisprudence to rule against labor. The Public Citizen report itself shows that Judge Bork sided with the

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[8] Based on cases listed in Public Citizen, at 133-136. Excludes en banc decisions.

[9] Public Citizen, at 44.

majority in most of these cases, dissenting only once: in seven cases where the majority voted against "workers' claims," the majority agreed with Bork five times, and reached a unanimous decision once. Public Citizen's report thus is less a critique of Judge Bork than an indictment of the U.S. Court of Appeals for the District of Columbia Circuit -- five of whose sitting judges are Democratic appointees.

Furthermore, in only fourteen of all nonunanimous cases did Judge Bork vote without the agreement of at least two other judges. In six of his twenty dissenting votes, the Supreme Court later agreed with him. To characterize a judge as "outside the mainstream" when at least one other appellate judge agreed with him in all but 14 of his 416 cases is thoroughly unwarranted.

Moreover, the rationales used by the reports in excluding or including cases are at best arbitrary and, at worst, contrived to distort the record. For example, ostensibly "nonunanimous" cases were included in the reports' samples regardless of the grounds for or extent of the dissenting judge's disagreement with the majority. For example, in Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987) which each one of the three statistical studies included in their sample, all judges on the panel agreed that the district court's decision granting the defendant's motion to dismiss the plaintiff's claim should be affirmed. Judges Bork and Buckley held that the Haitian Refugee Center lacked standing to bring its complaint. Judge Edwards held that the Center had standing, but that it had not stated a claim on which relief could be granted. In fact, although Judge Edwards

said he was dissenting, he was merely concurring in the affirmance, albeit on different grounds. The characterization of this case by the reports as a nonunanimous decision reveals the hazards of failing to undertake a close analysis of decisions.

Similarly, Public Citizen skewed its sample by excluding four nonunanimous cases, ostensibly "because the government was not a party." Two of these, the study concedes, "are important First Amendment cases in which . . . Judge Bork's vote could be characterized as recognizing rights under the First Amendment." (Public Citizen, at 12 n.8 (citing Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984)(en banc), cert. denied 471 U.S. 1127 (1985) and Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984)). No principled explanation is given as to why Judge Bork's non-unanimous decisions involving government are worthy of inclusion in their statistics, but those in which the government was not a party are not. In addition, Public Citizen's description of Reuber v. United States is simply inaccurate: as the name of the case might suggest, the government was in fact a party. Public Citizen's failure to include these two "pro-" First Amendment decisions in its tables -- when one category in which cases were listed in its report was called "First Amendment," and when both the AFL-CIO and the Students' report included those cases in their tables[10] -- reflects the bias with which Public Citizen's

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[10] Both the Student and AFL-CIO reports characterize Reuber and Ollman as cases in which Judge Bork voted "for a party asserting a right."

tabulation was undertaken.[11]

The AFL-CIO's selection of cases is perhaps even more skewed. It includes all denials of suggestions for rehearings en banc in which a dissent was filed and in which Judge Bork filed a written opinion. As lawyers practicing before the D.C. Circuit, the two attorneys who wrote the AFL-CIO study know that a judge's opinion as to whether a particular case should be reheard before the full court is a different decision than is a decision on the merits by a judge sitting on a panel. When a judge dissents from the denial of a motion to rehear a case en banc, he is publicly stating that he believes the issue raised by the panel's opinion is sufficiently important to merit consideration by a full court. Any views he expresses are of necessity tentative, as he is objecting to the court's refusal to allow him fully to consider the case.[12]

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[11] One of the other two cases omitted by Public Citizen, Weisberg v. United States, 745 F.2d 1476 (D.C. Cir. 1984), was similarly included in the statistics of both the Students' and AFL-CIO studies. There, Judge Bork agreed with a plaintiff suing under the Freedom of Information Act that his case could be heard elsewhere, while the majority denied his request for rehearing.

[12] United States v. Singleton, 763 F.2d 1432, 1433 (D.C. Cir. 1985), (Edwards, J., joined by Robinson, Jr., and Ginsburg, J., concurring in denial of rehearing en banc). By declining to rehear the case, however,

> [w]e do not sit in judgment on the panel; we do not sanction the result it reached." Jolly v. Listerman, 675 F.2d 1308, 1311 (D.C. Cir.) (Robinson, C.J., concurring in denial of rehearing en banc) (footnote omitted), cert. denied, 459 U.S. 1037, 103 S. Ct. 450, 74 L.Ed.2d 604 (1982). We decide merely that, because the case does not present questions of 'real significance to the legal process as well as to the litigants,' review by the full court is not justified. Id. at 1310 (quoting

Further, because cases are reheard by the full court only rarely, a vote to rehear a case en banc turns on the importance as well as the correctness of the panel opinion. This is not to say that the cases involved are not more important: they generally are. But in important respects they are different, and any statistical study that does not take account of that fact produces an incoherent impression of judicial decisionmaking. Moreover, including votes on motions to rehear cases en banc inevitably tends to skew a sample in the direction of the most controversial and polarizing decisions, because only such cases are even considered for rehearing by the full court. It thus tends to overstate the degree of disagreement between judges.

In sum, by choosing to include only selected nonunanimous decisions in their statistical compilations, the authors of these reports were, at best, using an arbitrary and uninformative sampling technique. In at least some instances, it seems clear that selection criteria were used simply to ensure that the reports' results would prove their hypothesis. The failure of these reports to undertake full, fair, comprehensive analyses of all of Judge Bork's decisions has in any case produced such inherent, gross distortions of his record as to render these analyses useless for purposes of this debate.

3. Categorizing cases, regardless of legal issues, based on the characteristics of the winners and losers is an illegitimate way to judge a judge's performance

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[12] (Cont.) Church of Scientology v. Foley, 640 F.2d 1335, 1341 (D.C. Cir. 1981) (en banc) (dissenting opinion), cert. denied, 452 U.S. 961, 101 S. Ct. 310, 69 L.Ed.2d 972 (1981)).

Far more problematic than the selection of the sample, however, is the reports' treatment of those cases. They relegate each case to a category and reduce them to a single vote, irrespective of the number or complexity of the legal issues involved. The cases are lumped into groups based solely on the characteristics of the litigants, ignoring both the subject matter of the dispute and the legal issues presented. Nor is Judge Bork's analysis considered at all.

This is an unacceptable way to assess a judge's record. Its gross flaws were noted by Professor Freund as long ago as 1949:

> A topical catalog of decisions or of votes of individual Justices is likely perforce to focus on the winning and losing litigants and the social interests with which they are identified: big business, taxpayers, labor, political or religious minorities, and so on. To rely on any such scheme of analysis is a dubious approach to an understanding of the Supreme Court. To be sure, there have always been occasions when all other policies or values or interests are submerged in a high tide of feeling on the Court about a particular social cause.
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> * * *
>
> To set up [such] preferences in contemporary causes as governing standards of performance for judges in our own day is scarcely a service to the administration of justice. Nor is it an adequate basis for an understanding of the work of the Supreme Court.

P. Freund, On Understanding the Supreme Court (1949).

The illegitimacy of the method can be best illustrated by example. Norfolk & Western Railway v. United States, 768 F.2d 373 (D.C. Cir. 1985), cert. denied sub nom., Aluminum Ash v. Norfolk and Western Railway Co., 107 S.Ct. 270 (1986), a case characterized by all three studies as "pro-business," illustrates

the inherent flaws of this technique. Norfolk & Western was a complicated administrative law case, involving a dispute between railroads and businesses over an I.C.C. order allowing shippers to seek reductions and refunds of certain individual freight rates for recyclable products. The I.C.C.'s order was attacked by railroad "businesses" and defended by recycling "businesses" such as the National Association of Recycling Industries, Inc., the Aluminum Association, Inc., Reynolds Metal Company, and Fort Howard Paper Company.

The specific issues in the case were whether the legal issue before the court had been previously decided and whether the Commission had acted arbitrarily and capriciously in ordering railroads to reduce rates and pay refunds twice under section 204(e) of the Staggers Act of 1980. Judges Ginsburg and Bork decided that the Commission's new method for determining rail freight rates was inconsistent with the D.C. Circuit's previous interpretation of that section. Seeking to give effect to every word of the statute, where the first and second sentences of the relevant provision were plainly contradictory, they determined that individual complaints by shippers for refunds had not been justified by the Commission.

The three reports labeled Judge Bork's vote to overrule the I.C.C. order as "pro-business," and counted it as one of eight split decisions brought by a business against the executive in which Judge Bork voted for the business. The intellectual bankruptcy involved in so simplistically characterizing this complicated decision is obvious. First, the case did not merely

involve a dispute between a government agency representing consumers on the one hand and business on the other. At issue were the rates one business -- railroads -- was to charge another business -- the paper and metal industries.[13] One therefore assumes that the three reports would have characterized Judge Bork's position as "pro-business" no matter which way he voted.

Further, the reports' treatment of the case demonstrates the way the cases in the reports were deliberately placed in whichever category would make Judge Bork's record seem the most biased. This legerdemain is readily available because almost all cases present a variety of issues, as Professor Freund has noted: "A case may present, in one aspect, an issue of civil liberties; it may also involve issues of federalism, or of the relation of the Court to the legislature, or of the standing of the litigant to invoke judicial redress at all."[14]

Norfolk & Western illustrates this potential for manipulation. One of the other categories in the Public Citizen study, for example, "Access to the Courts," focused on procedural bars to determinations on the merits of a case. Here, Judge Bork determined that the railroads' petition was not barred by the jurisdictional provisions of the Hobbs Act or by principles of

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[13] It might be thought that lowering rates for metal and paper would result in lower costs to consumers. This argument assumes that only one group of business interests -- the metal and paper industries -- are able to pass along their increased costs to consumers. In fact, whether an industry can shift certain costs to consumers is dependent upon a large number of factors, such as the relative elasticity of the demand it faces. These factors were simply not at issue in the case.

[14] P. Freund, On Understanding the Supreme Court at 3-4 (1949).

res judicata. He was voting against "closing the courthouse door," and in favor of hearing the petitioner's contention. But the studies choose to characterize this vote as pro-business, instead of including it in their "Access to Courts" category. In this way, the Public Citizen report is able to state that Judge Bork voted to "close the courthouse doors" in all fourteen cases presenting the issue of access. The conclusion is hardly escapable that Judge Bork's votes were deliberately misrepresented to serve the partisan aims of the groups authoring the studies.

This treatment of Norfolk & Western illustrates another inconsistency in the reports. Although ostensibly focusing on the characteristics of the litigants, the reports in fact only so categorize cases when it serves their purposes to do so. Some cases are categorized based upon the issues involved, such as whether Judge Bork voted to grant access to the courts or not. This sleight-of-hand further enables the authors to characterize a vote in the manner most detrimental to Judge Bork. This technique, for example, is used by Public Citizen to avoid labelling Judge Bork's vote in Citizens Coordinating Committee on Friendship Heights, Inc. v. Washington Metropolitan Area Transit Authority, 765 F.2d 1169 (D.C. Cir. 1985), as anti-business, even though Judge Bork there voted against Mazza Gallerie in a suit against a government authority.[15] The same is true of Public Citizen's treatment of Judge Bork's vote in Northwest Airlines, Inc. v. Federal Aviation Administration, 795 F.2d 195 (D.C. Cir.

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[15] 765 F.2d 1169 (D.C. Cir. 1985).

1986), where he voted to uphold the F.A.A.'s decision to recertify a pilot who had previously been fired for flying an airplane while intoxicated.[16] Of course, Judge Bork's vote in this case could also have been counted as a pro-employee vote, because Judge Bork was voting to save an employee's job and against a business. But so characterizing the vote would not have advanced Public Citizen's objective.

Furthermore, the complexity of judicial decisions frequently makes reducing complex judicial decisions to wins and losses for one party or the other an intellectually bankrupt exercise. For example, is a vote to strike down regulations and remand the issue to the agency a "win" for the group challenging the regulations or for the agency? Common sense would seem to characterize such a vote as "for" the party challenging the regulations. Yet each of the three reports treats Judge Bork's vote in Planned Parenthood v. Heckler, 712 F.2d 650 (D.C. Cir. 1983), which fits this description, as a "victory" for the executive and a "loss" for a public interest group. Similarly, is a vote for a union that challenged an agency's decision requiring it furnish attorneys to nonunion employees a "pro-business" vote? Outrageously, the Public Citizen study characterizes it as such, on the theory that a union is a "business." And can a vote granting a public interest group's petition for review and remanding an issue for reconsideration by the agency be fairly characterized as a "pro-executive agency" vote? Apparently the Public Citizen thinks so, for it so labeled

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[16] 675 F.2d 1303 (D.C. Cir. 1982).

Natural Resources Defense Council v. Environmental Protection Agency, 804 F.2d 710 (D.C. Cir. 1986), rehearing en banc, ___ F.2d ___ (July 28, 1987).[17]

Finally, looking only to the parties involved in analyzing cases leads to absurd conclusions. For example, the Students' report categorizes Judge Bork's vote as "conservative" in 38, or ninety percent, of the 42 cases it considered. But this is surely a vast overstatement, for in 16, or forty-two percent, of those 38 "conservative" votes, a judge appointed by Presidents Carter, Johnson, or Kennedy voted for the same disposition as did Judge Bork. The authors of the student's report suggest that Judge Bork is not "within the Republican mainstream;" the authors of the Public Citizen report assert that he is not a "moderate."

[17] That Public Citizen kept this case in its table as a pro-executive agency decision is made all the more remarkable by their acknowledgment of the opinion drafted by Judge Bork, after rehearing of the case by the full court. The outcome of the case, as reported by Public Citizen, is that "because EPA had not made the requisite safety finding before considering cost and technical feasibility, the court remanded the case for further proceedings before EPA." (Public Citizen, at 25) It is true that this opinion was handed down only a few days prior to Public Citizen's release of its study, which was undoubtedly substantially complete when the decision was made public. Nevertheless, if there was sufficient time to discuss the decision in a footnote, there was surely enough time to remove it from the statistical tables, which still include this case. The case should either not be considered, because the decision was unanimous, or it should be counted as a pro-public interest group case.

Attempting to discern whether this case is in fact still included in the tables (the statements of Public Citizen lead to the conclusion that it is) points out another indefensible technique employed by Public Citizen, though avoided by the other studies. It is impossible to tell which cases Public Citizen counts as pro-business and which are counted as anti-business. Although the footnotes at the beginning of each section list the non-unanimous cases involving the types of parties (or issues) discussed in each section, nowhere does the study plainly list

However, his 42% agreement rates with Democratic appointees even in this narrow range of cases demonstrates under the author's arbitrary techniques, if anything, that Judge Bork is "within the Democratic mainstream". This fact, of course, was conveniently omitted by the reports. Also omitted is the fact that the Supreme Court has never reversed any of the almost 400 decisions authored or joined by Judge Bork, and that "moderate" Justice Lewis Powell agreed with Judge Bork in 9 of the 10 Bork opinions reviewed by the Supreme Court.

By categorizing cases, regardless of the issues presented, on the basis of whether a judge voted for or against a public interest group, for or against an administrative agency to the detriment of a business group, or for or against a party asserting a certain right -- thereby focusing on the characteristics of the parties rather than the legal issues presented by the dispute -- these studies misrepresent what judges do and exploit an illegitimate method for assessing a judge's performance. The fairest measure of a judge's performance is whether in the circumstances of each case he has fairly construed and competently applied the law. Any analysis based only upon the characteristics of those who won or lost assumes that judges ignore all of the factors they have been trained to consider in order to engage in the rankest kind of result-oriented jurisprudence. To indulge this assumption -- as these studies do -- demeans the judicial function and reflects only the "result-oriented" bias of these groups.

[17] (Cont.) the cases included in the tables and the

As Third Circuit Judge Edward Becker and Chief Executive William K. Slate recently said in criticizing exercises of this kind:

> We cannot forget that lawsuits are highly individualized and the exercise of judgement is not easily systemized. To miss this is to lose touch with the very soul of the judicial enterprise.[18]

The fact is that the methodology adopted by these reports, although it purports to analyze comprehensively a judge's decisions, is a wholly inadequate and inappropriate substitute for a thorough and reasoned analysis of the legal principles actually relied upon and applied in individual cases.

C. The District of Columbia Circuit

There is a final, less concrete reason that the statistics are misleading. During Judge Bork's tenure, the District of Columbia Circuit was comprised of a large number of "activist" judges who warmly received, and thus directly encouraged, many activist claims by liberal public-interest groups.

When Judge Bork joined the District Of Columbia Circuit in 1982, he became only the fourth active judge on that Circuit appointed by a Republican President. Seven of the judges, including the Chief Judge, had been appointed by Democratic Presidents. If senior circuit judges are included in this count, the ratio becomes nine to five. Many of these nine judges -- most notably Judges David Bazelon and J. Skelly Wright -- were ardent advocates of the activist judicial philosophy which holds,

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[17] (Cont.) characterization of each vote.

[18] A.B.A. Journal, August 10, 1987, at 18.

in Judge Wright's words, that the ultimate test of a judicial decision "must be goodness", rather than fidelity to the actual intent of legislators or the Framers. Wright, Professor Bickel, The Scholarly Tradition and the Supreme Court, 84 Harv. L. Rev. 797 (1971). That activist philosophy, followed by these judges, made the D.C. Circuit a most hospitable circuit for claims by public interest groups. Naturally enough, these groups preferred to litigate there.

Although such contentions are hard to sustantiate concretely because, as we point out throughout this paper, statistics do not accurately reflect judicial decision-making, the available evidence does support this reputation. For example, a 1982 survey by the Capital Legal Foundation ("CLF") found that eight environmental public interest groups used the federal venue statute then in force, which allowed litigants to choose a number of different places in which to commence their suit, to file their suits in the D.C. Circuit 31 percent, of the time. This is a highly disproportionate percentage since the D.C. Circuit was then one of eleven federal circuits. Similarly revealing is the fact that, using the CLF's definition of environmentalist victories, these environmental groups "won" 27 percent more often in D.C. than in the rest of the federal circuits combined.

Conventional wisdom among environmentalists supported this perception of the D.C. Circuit. As one environmentalist wrote in the Ecology Law Quarterly: "Few circuits are as understanding of the conservationist cause and of the difficult issues raised as the D.C. Circuit . . . ." Cited in Senate Committee on the

Judiciary: Hearings Regarding Venue on S. 2419, 97th Cong., 2d Sess. at 37 (1982). This approach obtained in other areas of administrative and constitutional law, as exemplified by a 1983 decision holding that the Food and Drug Administration had acted unlawfully by refusing to ban a drug because it was not "safe and effective" for use in executing convicted murderers. Chaney v. Heckler, 718 F.2d 1174 (D.C. Cir. 1983), reversed, 470 U.S. 821 (1985).

It is thus hardly surprising that Judge Bork's neutral and impartial legal interpretation would lead to disagreements with some of his colleagues and be less helpful in implementing a particular agenda. It is fair to conclude that the percentage of split decisions where one other judge favored an interest group would have been markedly lower on any other court of appeals. Indeed, for this reason, it is all the more remarkable that Judge Bork was in the majority as much as 95% of the time and that in only 14 cases did he vote alone.

In sum, the entire statistical universe examined by the reports involves cases in which any one judge disagreed with Judge Bork regardless of whether that judge was activist, or faithfully applied the law, or whether a third judge on the panel agreed with Judge Bork. Thus, the sum total of the message delivered by these studies is that Judge Bork occasionally disagreed with activist colleagues in cases where these judges would be most inclined to activism -- those which would not have been brought in any other court of appeals other than the D.C. Circuit. This may tell us much about the litigation strategies

of liberal public interest groups; it may even tell us something about the make-up of the D.C. Circuit; but it surely tells us nothing about the integrity and impartiality of Robert Bork.

D. A More Accurate Picture

As should be clear from the above discussion, there are severe limitations on the use of statistics to judge a judge. But the reports make no attempt to give a complete picture of Judge Bork's record, even in statistical terms. As noted above, such a picture must include all of the cases in which Judge Bork participated in which there was a decision on the merits.

Focusing on all of the decisions on the merits in which Judge Bork participated (excluding motions for rehearing) reveals a much different picture than is painted by the special interests. Of 413 appellate cases and 3 cases where Judge Bork sat as a trial judge on a three judge panel, Judge Bork voted in the majority in 396 cases or 95% of the time. And, as the following table reveals, he dissented in only 20 cases.

JUDGE BORK'S MAJORITY/DISSENTING RECORD

Total Cases	416	
Total Cases in Majority . . .	396	-- 95% of total cases
Majority Opinions (Author)	117	-- 28% of total cases
Joined Majority	279	-- 67% of total cases
Total Cases in Dissent (includes full dissents and dissents in part) . . .	20	-- 5% of total cases

By focusing only on nonunanimous cases the reports fail to tell the true story. For example, the AFL-CIO accuses Judge Bork

of being "opposed to the claims of . . . labor" (AFL-CIO, at 29), but leaves out the fact that in Judge Bork's 46 cases involving labor and workplace safety, he voted for the union or employee in 34, or 74% of the time.[19] The Biden report accuses Judge Bork of having an "extremely restrictive" view of the First Amendment (Biden Report, at 50), but neglects to tell us that in the 14 First Amendment cases where the outcome was clear, Judge Bork voted for the party seeking the First Amendment's protection in 6 cases, or 43% of the time.[20] The ACLU suggests that if Judge Bork is confirmed, "civil liberties in this country would be radically altered" (ACLU, at 5), but fails to report that in 7 of 8 civil rights cases, Judge Bork voted for the claimant -- an astounding 88% of the time.

Similarly, Public Citizen fails to report that even in the 56 nonunanimous cases it studied, Judge Bork voted alone in only 14 of them, and was in the majority in 39, or 70%, of those cases. Of the 56 cases, he voted with Democratic appointees 26 times, or 47% of the time. Excluding his 14 panel dissents, he voted with a Democratic appointee 62% of the time. In the 29 panel opinions in which he was in the majority, he voted with a Democratically-appointed judge in 15 cases, or 52% of the time. In en banc cases, Judge Bork voted with a Democratic appointee in 11 of 12 cases, or 92% of the time.[21]

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[19] Judge Bork participated in 55 such cases. The result in 9 of them was mixed.

[20] The result in one First Amendment case was mixed.

[21] This omits one recent en banc case in which Judge Bork was also joined by a Democratic appointee, Northern Natural Gas Co. v. FERC, No. 84-1516, 85-1045 (Aug. 21, 1987). We have also

In general, Judge Bork has voted with his colleagues appointed by a Democratic President in overwhelming percentages, as the table below makes clear:

JUDGE BORK'S RECORD VIS-A-VIS OTHER JUDGES

Other Judge	Total Cases	Voted With Bork	Voted Against
R. Ginsburg	87	79 -- 91%	8 -- 9%
Wald	96	73 -- 76%	23 -- 24%
Mikva	93	76 -- 82%	17 -- 18%
Edwards	105	84 -- 80%	21 -- 20%
Wright	71	53 -- 75%	18 -- 25%

Most important, however, is Judge Bork's record on appeal. As the table below indicates, he has never been reversed by the Supreme Court and, of his dissents, taking into account his dissents from denials of rehearing en banc, the Supreme Court has adopted positions Judge Bork has advocated 6 times.

JUDGE BORK'S RECORD ON APPEAL

Total Cases 416

Majority Opinions (Author)

Number of cases . . . . . 117 -- 28% of total

Reversed by Supreme Court . . 0

Reversed by D.C. Circuit en banc . . . . . 1[22]

Total Majority Opinions Joined

Number of Cases . . . . . 279 -- 67% of total

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[21] (Cont.) omitted one dissent from a denial of rehearing en banc, Hohri v. United States, 793 F.2d 304 (1986).

[22] See Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984) (en banc).

Reversed by Supreme Court . . 0

Reversed by D.C. Circuit en banc 1

Dissenting Opinions (Authored or Joined)

Number of Cases . . . . . 20 -- 5% of total

Adopted by Supreme Court . . 6

Adopted by D.C. Circuit en banc . . . . . 1[23]

Faced with these impressive statistics, the Biden report takes refuge in irrelevancy. It states that "none of Judge Bork's majority opinions has ever been reviewed by the Supreme Court." (Biden Report, at 17) The report rather carefully avoids drawing any inferences from this fact, and one can understand why. Bork has joined majorities in cases that were reviewed by the Supreme Court, and the Supreme Court has adopted his position in all such cases. He has dissented from decisions he thought wrong, and the Supreme Court has adopted his position. He has dissented from denials of rehearing en banc, suggesting that the Supreme Court prevent the majority's decision from becoming the law of the circuit, and the Supreme Court has adopted his position. That the Supreme Court has never reviewed a majority opinion that he has written means that those decisions did not merit review by the Supreme Court, and the Court was content to let them represent the binding authority for the Circuit.

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[23] See Jersey Central Power and Light Co. v. FERC, 810 F.2d 1168 (D.C. Cir. 1987) (en banc).

The Supreme Court does not sit in review of every case; it only reviews those decisions that it believes wrongly decided or badly justified, and therefore in need of correction, or those cases so important that they merit the Court's valuable time. For this reason, it is far more significant that the Supreme Court has adopted Judge Bork's position 6 times when he was in dissent. The Court's action means that it recognized that his position was correct, and that it should be the law of the land. An appellate judge can receive no greater vindication.

In sum, these statistics demonstrate, if anything, Judge Bork's balance.

Finally, we note that in the hands of those with a different ideological perspective than that of Public Citizen, Public Citizen's methodology yields a completely different picture even of Judge Bork's nonunanimous cases. As we have exhaustively pointed out, these methods of selection, categorization and characterization are intellectually bankrupt. But they are the techniques that the reports have adopted. Mimicking these techniques, we have recategorized and recharacterized their cases. As might be expected, our calculations of Judge Bork's votes in nonunanimous cases come out very differently.[24] The results reveal that Judge Bork votes consistently neither for business interests and the executive, nor against individuals, but is completely even-handed. In litigation between individuals or public interest groups and the government, Judge Bork voted for the individuals in 5 cases and for the government in 6 cases.

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[24] The results are reported in Appendix A.

In 5 of the 6 government cases, Judge Bork wrote or joined the majority. In 8 of these 11 cases, Judge Bork either voted for the individual or was joined by one or more judges nominated by a Democratic President.

In 8 labor cases, Judge Bork sided with the employee or union 3 times and with the employer or government 5 times. In cases involving business regulation, Judge Bork voted for a business 4 times and against 4 times. He upheld a party asserting a first amendment right twice and voted against such parties twice. He allowed access by plaintiffs to the court in 3 cases, and denied or limited access in 5 cases. In six of these eight access cases, Judge Bork joined the majority (and of these he wrote only one of the opinions). Twice Judge Bork voted against a plaintiff seeking a determination impinging on foreign affairs. Thus, even under the least favorable and most unprincipled sampling of cases used by Public Citizen, Bork's record can be "shown" to be "even-handed" by simply recategorizing the cases.

E. Judge Bork and Justice Scalia

The Women's Center, together with the other reports, condemn Judge Bork's position in Vinson v. Taylor,[25] as "extreme" (Women's Center, at 25). The ACLU accuses Judge Bork of adopting a "narrow construction" of the Occupational Safety and Health Act in Oil, Chemical & Atomic Workers International Union v. American

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[25] 753 F.2d 141 (D.C. Cir. 1985), rehearing en banc denied, 760 F.2d 1330 (D.C. Cir. 1985), aff'd in part and remanded sub. nom. Meritor Savings Bank v. Vinson, 106 S. Ct. 2339 (1986).

Cyanimid Co.[26] (ACLU, at 17). And the Biden report attacks Judge Bork's "novel approach to lower court constitutional adjudication in Dronenburg."[27] (Biden Report, at 18)

But these decisions have more in common than the fact that Judge Bork wrote them: Justice, then Judge, Scalia joined each of them.

About Justice Scalia, Senator Joseph Biden said, "notwithstanding his conservative bent, there is no indication that the nominee's philosophy would unravel the settled fabric of constitutional law."[28] Senator Kennedy noted that, although a few of Judge Scalia's positions concerned him, "I too find that Judge Scalia is in the mainstream of thought of our society. . ."[29] and voted to confirm him. Senator Metzenbaum noted that Judge Scalia had been a "fair and open-minded judge on the court of appeals," and noted that "while I disagree with the results he has reached in some decisions, I must note that he has not shown himself to be hostile to basic constitutional values,"[30] and he, too, voted to confirm Judge Scalia. The list goes on.

Senator Cranston said that although he "believe[d] that in some ways Judge Scalia is more conservative than Justice Rehnquist," he did not believe "that his mere conservativeness

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26 741 F.2d 444 (D.C. Cir. 1984).

27 Dronenburg v. Zech, 746 F.2d 1579 (D.C. Cir. 1984).

28 132 Cong. Rec. S12833 (daily ed. Sept. 18, 1986).

29 Id. at S12834.

30 Id. at S12834.

would disqualify him to be a Justice, even of this already conservative Supreme Court."[31]

In fact, Judge Scalia and Judge Bork not only share the same judicial philosophy, but in the 86 panels on which they sat together, they voted together 98% of the time. In only two cases did they differ, and one of those cases was Ollman v. Evans, in which Judge Scalia scathingly criticized Judge Bork for his liberal reading of the First Amendment.

Yet last year, the Senate confirmed Antonin Scalia unanimously -- not one negative vote. Thus, Senators Biden, Metzenbaum, and Cranston unhestitatingly confirmed his elevation to the Supreme Court. But how different is Justice Scalia from Judge Robert Bork? Both practiced law in the Mid-west after distinguished law school careers. Both left for academic life, and each then served in a high Justice Department position. Both have been judges on the D.C. Circuit Court of Appeals, and the Senate confirmed both of them to that court without objection.

On the D.C. Circuit, they sat together on 86 cases, and voted together in 84. Both espouse and adhere to the philosophy of judicial restraint. In fact, an extraordinarily high number of the opinions that interest groups find objectionable were either written by Judge Bork with Judge Scalia concurring, or written by Judge Scalia with Judge Bork concurring. For example, in Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984), a case condemned by the Public Citizen as pro-business (Public Citizen, at 64), Judge Bork joined a dissent written by

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[31] Id. at S12840.

Judge Scalia. In U.S. v. Singleton,[32] attacked as "an example of Judge Bork's willingness to come to the aid of the prosecution" (Public Citizen, at 80), he was joined by Judge Scalia. In the initial panel opinion in Restaurant Corporation of America v. NLRB, 801 F.2d 1390 (D.C. Cir. 1986), which the Public Citizen report says "is based on [Judge Bork's] personal value judgments about the realities of labor relations (Public Citizen, at 41)," he was joined by Judge Scalia.[33] Finally, the Student's report grouped Judge Scalia and Judge Bork in the group of academics appointed by President Reagan to the bench, who vote "on the liberal side of the case only 12% of the time, far less than the 34% for the rest of the Reagan judges and the 35% rate for other GOP appointees."[34]

In short, the similarities between these two esteemed jurists is nothing short of overwhelming. Judge Scalia was confirmed by the Senate unanimously. So should Judge Bork be confirmed.

5. Judge Bork and Justice Powell

The ACLU charges that Judge Bork falls outside "the conservative judicial tradition" most lately "exemplified" by Justice Lewis Powell. (ACLU, at 47) The Biden report posits that "a nominee such as Judge Bork could dramatically change the

32 759 F.2d 176 (1985), rehearing en banc denied, 763 F.2d 1432 (1985).

33 Judge Bork was also joined by Judge Scalia in many opinions for which he is lauded, for example, Lebron v. WMATA, 749 F.2d 893 (D.C. Cir. 1984).

34 Note, All the President's Men: A Study of Ronald Reagan's Appointments to the U.S. Court of Appeals, 87 Colum. L. Rev. 101, 115 n.66 (1987).

direction of the Supreme Court," and contrasts Judge Bork with Justice Powell, whom it terms a "moderate conservative" and "quite moderate." (Biden Report, at 11) Some of the other reports (including the AFL-CIO Memos and Public Citizen) avoid direct comparison of Judge Bork and Justice Powell, but their incessant claims of extremism imply that there is a wide gulf between the nominee and the Justice he was nominated to replace.

For this reason, examination of Justice Powell's record is especially illuminating. Whether one cares to describe him as a "moderate conservative" or simply as a "moderate," there is no dispute that Justice Powell was a non-ideological, open-minded, centrist Justice. For that reason, a statistical assessment of Justice Powell's voting record can tell us a great deal about the validity and worth of statistical comparisons that treat a judge's votes as "for" or "against" particular groups, classes, institutions, or ideas. If this result-oriented methodology yields a simplistic and erroneous portrait of Justice Powell -- for example, if it would typecast him as a pro-business conservative ideologue and a foe of civil rights -- then the dangers and inaccuracies of that methodology will have been dramatically and conclusively established.

In fact, that misleading characterization of Justice Powell as hostile to civil rights and receptive to business interests is exactly the characterization toward which a result-oriented survey of his voting record points. Consider the following "facts" -- and imagine what the authors of the result-oriented reports would be saying about Judge Bork if these were "facts" about his record rather than about Justice Powell's:

(1) In non-unanimous decisions involving voting rights, Justice Powell voted against minority plaintiffs in 16 out of 22 cases.

(2) In non-unanimous decisions involving the rights of the handicapped under section 504 of the Rehabilitation Act of 1973, Justice Powell voted against the handicapped in 7 out of 8 cases.

(3) In non-unanimous decisions involving gender discrimination under provisions such as the Equal Protection Clause, the Due Process Clause, Title VII, Title IX, and the Equal Pay Act, Justice Powell voted against the civil rights plaintiffs in 14 out of 21 cases.

(4) In non-unanimous decisions involving school desegregation, Justice Powell voted against the minority plaintiffs every time, in 6 out of 6 cases.

(5) In non-unanimous decisions involving age discrimination, Justice Powell voted against the aging every time, in 3 out of 3 cases.

(6) In non-unanimous decisions under Title VII of the Civil Rights Act (excluding eight Title VII decisions already included in (3) above) -- a category that encompasses many employment-related racial discrimination and affirmative action cases -- Justice Powell voted against the civil rights plaintiffs in 17 out of 19 cases.

(7) By contrast, during the past five Terms, in non-unanimous business-related decisions, Justice Powell voted in favor of business interests in 36 out of 46 cases.[35]

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[35] To determine which cases were business-related during each Term surveyed, we relied on United States Law Week's annual "Review of Supreme Court's Term: Business Law".

Using the methodology of Judge Bork's opponents, the portrait of Justice Powell that emerges from these statistics about "tough cases" on the Supreme Court is as stark as it is crude: Justice Powell, it seems, is hostile to minority voting rights, to claims of sexual or racial discrimination in the workplace, and to women's rights generally. He is even more hostile to the rights of the handicapped, of the aged, and of minority school children. And his consistent and predictable opposition to civil rights claims stands in sharp contrast to his persistent solicitude for the welfare of large corporations: he voted against civil rights plaintiffs in 79% of the non-unanimous decisions categorized above (63 out of 79 decisions), while voting in favor of business interests 78% of the time (36 out of 46 decisions).

This portrait of Justice Powell, of course, is highly misleading and unfair. That is precisely the point. Those, like Public Citizen, the AFL-CIO and the ACLU, who assail Judge Bork on the basis of this same result-oriented, cynical methodology, paint an equally unrealistic picture. Indeed, because the vast majority of the Supreme Court's cases are non-unanimous, a methodological focus on non-unanimous decisions results in a much larger and more representative sample for Justice Powell than for Judge Bork, 86% of whose votes were cast in unanimous decisions. In any event, Judge Bork, like Justice Powell, is a principled and openminded jurist rather than an an extremist ideologue. Like Justice Powell, he deserves to be considered on the basis of his record and his reasoning, not on the basis of a caricature paraded in the false dress of statistical authenticity.

II. Legal Analysis

A. Stare Decisis

When at a loss to misrepresent Judge Bork's judicial opinions because he has not ruled on a subject, the reports resort to a parade of horribles by misrepresenting Judge Bork's position on stare decisis and suggesting that Judge Bork would vote to overturn all of the cases he criticized as a professor. This overlooks Judge Bork's view of the importance of adherence to precedent. But Judge Bork recognizes that even wrongly decided precedent ought not to be overturned without an extraordinarily searching examination of all possible effects of such a reversal. Moreover, Judge Bork has expressed the view that there are certain well-established decisions that ought not to be overturned even if new evidence were discovered conclusively demonstrating that the Framers' intentions did not support those decisions. For example, Judge Bork has said, "I think the value of precedent and of certainty and of continuity in the law is so high that I think a judge ought not to overturn prior decisions unless he thinks it is absolutely clear that the prior decision was wrong and perhaps pernicious."[36]

Even under those circumstances, Judge Bork believes that precedent upon which legislation and societal expectations have been built should not be overturned absent the most exceptional circumstances. The primary example of such cases are those based on the Commerce Clause, the source of congressional authority for

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[36] Confirmation of Federal Judges, Hearing before the Comm. on the Judiciary, 97th Cong., 2nd Sess. 14 (1982).

the major civil rights acts of the 1960's. As to those cases, Judge Bork said, "no court should try to turn the law back."

> It is simply too late. Too much of our statutory law, our administrative agencies, our corporations and unions, our private institutions and settled expectations are built on a broader view of the Commerce power. To pull back now would be to create chaos so great as to be in effect a reformation of our entire government and society. The nation has become something that judges cannot undo.[37]

This respect for precedent should alleviate the often-overstated concerns of the special interest groups.

B. Constitutional Law

1. Substantive Due Process.

The studies' mischaracterization of Judge Bork's opinions adopt a "damned-if-you-do, damned if you don't" treatment of them. For example, Public Citizen finds that Judge Bork has participated in a "limited number of constitutional cases," but concludes from those cases that "the record shows his judicial approach to constitutional decision-making is no less based on his own personal values than is the approach of the 'liberal' judges he criticizes." (at 52) Judge Bork's long-time opposition to substantive due process -- the doctrine judges use to read into the Constitution their own personal policy preferences to accord protection to privacy or "economic rights" -- belies this outrageous claim.

Both Public Citizen and the Women's Center begin their attack on Judge Bork in this area by stating, accurately, that "one of the most controversial individual rights that have been

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[37] Speech to the Federalist Society Convention, January 31, 1987.

afforded constitutional protection is the right to privacy, which was first articulated in Griswold v. Connecticut, 381 U.S. 479 (1965), a case that struck down a law prohibiting the use of contraceptives." (Public Citizen, at 55; see also Women's Center, at 19). Public Citizen then reiterates Judge Bork's statement (made when he was a professor) that "I am convinced, as I think most legal scholars are, that Roe v. Wade [the decision striking down certain state abortion laws] is, itself, an unconstitutional decision, a serious and wholly unjustifiable usurpation of State legislative authority." (at 56)[38] As usual, it, together with the other reports, tells only one half of the story. The reports fail accurately to state either Judge Bork's constitutional theory justifying his decisions in the individual rights area or to relate that Judge Bork's position is in the tradition of this century's greatest jurists.

Judge Bork's approach to constitutional interpretation, briefly stated, is that without any value or rule fairly indicated by the text, history, or structure of the Constitution, a judge may not properly set aside the considered judgment of elected officials. About Griswold, Roe and similar cases finding a constitutional right to privacy, Archibald Cox says:

> Justice Frankfurter, Judge Learned Hand, and the other apostles of judicial self-restraint would have no trouble upholding the constitutionality of the statutes [struck down in Roe v. Wade as unconstitutional]. At most, they would have said the courts may do no more under the Due Process Clause than invalidate a law that no one could rationally believe related to some public

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[38] The Human Life Bill, Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary, 97th Cong., 1st Sess. 310 (1981).

> interest; and no one could sensibly claim that an anti-abortion law fails this test. Justice Black would have reached the same conclusion.

A. Cox, The Role of the Supreme Court in American Government, 52 (1976). In fact, Justice Black dissented in Griswold, and was joined in dissent by Justice Potter Stewart.[39]

Public Citizen characterizes Dronenburg v. Zech as "the foremost example of Judge Bork's restrictive right to privacy" (at 56) The Biden report calls it a "novel approach to lower court constitutional adjudication." (at 18) In this unanimous opinion, in which then-Judge Scalia concurred, Judge Bork ruled that there is no constitutional right to engage in homosexual conduct. Public Citizen, the Women's Center, and the Biden report, in an effort to paint as negative a picture of Judge Bork as possible, quote the four judges who dissented from the denial of rehearing en banc who criticized "the use of the panel's decision to air a revisionist view of constitutional jurisprudence" and "to wipe away selected Supreme Court decisions." 746 F.2d at 1580.

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[39] As Justice Black said in his dissent:

> The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not." * * * I like my privacy as much as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional."

381 U.S. at 508, 510 (citations omitted).

These critics all neglect to mention, however, that the Supreme Court itself did not believe that Judge Bork had "wipe[d] away" its decisions, but rather subscribed wholeheartedly to Judge Bork's view of privacy last year in Bowers v. Hardwick, 106 S.Ct. 2841 (1986) where it decided that the Constitution does not confer upon homosexuals a fundamental right to engage in sodomy. They also neglect to mention, of course, that Justice Powell joined the Supreme Court's majority opinion in Bowers. Moreover, the Court and Justice Powell so ruled in a case that intruded much more severely into a "homosexual right to privacy," i.e., a criminal statute forbidding homosexual relations in one's own home, rather than a mere exclusion of homosexuals from military service.

Next, Public Citizen, which gives the most extensive, albeit misleading, analysis of Judge Bork's judicial opinions, criticizes Judge Bork for applying a "restrictive approach to the constitutional right of privacy in Franz v. United States, 707 F.2d 582 (D.C. Cir. 1983)." That case arose when "the Justice Department relocated a federal witness, his new wife, and her children by a former marriage, and then concealed the children's whereabouts from their father who retained visitation rights." (Public Citizen, at 57) Public Citizen suggests that Judge Bork was denying to the father the right to sue to see his children. In fact, Judge Bork agreed with the majority that the case should be remanded to enable the father to continue his legal battle to enforce his state-created visitation rights. Judge Bork's primary disagreement with the majority is that he did not think

it appropriate to reach the constitutional issue in the case, and to create a new constitutional right where one was not necessary. In large part this was due to the inadequate record before the court; the court did not know "whether, if there was no visitation order, [Franz] would nevertheless have visitation rights under Pennsylvania law, assuming that law to be controlling."

> We do not know what defenses Pennsylvania law provides [Franz's ex-wife] in an action brought by [Franz] to enforce his visitation rights. Nor do we know whether persons (such as the defendants here) violate state law when they assist the custodial parent in defeating the visitation rights of the other parent.

712 F.2d at 1434.

While it is quite true that Judge Bork opposes judicially invented "privacy" or other rights, this case does not demonstrate, as Public Citizen contends it does, that Judge Bork only exercises judicial restraint when individuals are asking the court "to prohibit governmental interference with their activities." (at 52) First, as should be apparent from the facts of the case, the rights of more than one individual were in opposition here. Granting to the father the right to see his children, over whom he did not have custody, imperiled their lives and the lives of the custodial parent. Nor is it fair to characterize this case as one in which Judge Bork is elevating the power of government at the expense of the individual. Judge Bork expressly stated that the Franz might well have a claim against the federal government, although one that arose under state law.

> Assuming that William Franz and his children have a right under state law to see one another, there is no doubt that that right has been destroyed by Catherine Franz with the assistance of the United States purporting to act under the authority of the United States. If Pennsylvania law recognizes a tort of interference with visitation rights, or provides some other remedy to [Franz], the question in this case is then simply whether the Organized Crime Control Act shields the United States and the defendant officers of the United States from liability. As the record now stands, I think the Act probably does not.

Id. at 1435. Whatever view one may take of substantive due process and of the legitimacy of court-created rights, surely all agree that judges ought not to create new constitutional rights where existing rights may suffice to dispose of a case. In sum, it is simply inaccurate to try to characterize Judge Bork's opinion as an interpretation of the Constitution that deprived a father of the right to see his children. Judge Bork voted to grant the father the relief he sought, suggested that he might well have a remedy against the federal government, and objected to the unnecessary creation of a constitutional right which takes away from the States the power to regulate family relations.

Public Citizen next discusses Judge Bork's opinion in Williams v. Barry, 708 F.2d 789 (1983). Judge Bork is excoriated for "express[ing] his opinion on an issue that the parties did not brief, and that the majority did not address: whether homeless men had any constitutional protection from arbitrary government action in the form of due process rights." (at 59) Once again, Public Citizen misrepresents Judge Bork's opinion. In Williams, Judge Bork agreed with Judges Wright and Edwards that the District of Columbia had accorded to homeless men all the process that was due them in its decision to close certain

shelters. He also joined the majority which vacated the District Court's determination that deciding to close the shelters would be unreviewable. The key consideration in determining the "process" that was "due," was whether the proposed governmental actions were "legislative" or "adjudicatory." Judge Edwards concluded they were legislative. Obviously, the majority raised the issue Judge Bork addressed: whether the contested decision was legislative or adjudicatory.[40]

Most important, to state that Judge Bork was deciding that homeless men had no due process rights is blatantly false. The portion of his statement to which Public Citizen objects discussed only the appropriateness of certain processes in wholly legislative procedures. That is, if Congress were to lower funding for the homeless, the homeless would not have a constitutional right to demand that members of Congress produce in court proof that they had considered all relevant evidence, followed proper procedures and provided a written explanation of their action. This would constitute a dramatic expansion of recognized due process rights, so Judge Bork is hardly alone in respecting such a constitutionally-mandated imposition on the legislative process.

The issue of homeless men's general due process rights was neither raised nor discussed, yet Public Citizen suggests that

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[40] Also, Judge Bork's statement that certain judicially-imposed processes are inappropriate in purely political decisions was prompted by a concession Judge Edwards had raised "wholly irrelevant to the case." Id. at 793. Judge Bork was not, as reading Public Citizen's report alone might suggest, raising on his own motion the issue of a cross-appeal to decide a case not before him.

Judge Bork went out of his way to make sweeping statements denying homeless men all due process rights. This is simply untrue. Reading Judge Bork's concurrence in Williams reveals the distance between Public Citizen's claims and the reality of Judge Bork's opinions.[41]

2. Business Rights

The authors of these studies either misunderstand, or deliberately misrepresent, Judge Bork's commitment to judicial restraint and accuse him of "consistently exercis[ing] judicial restraint when individuals have asked the court to prohibit interference with their activities," but of being "much more willing to find new constitutional guarantees when it is business complaining about government intrusion." (Public Citizen, at 52, 64) This statement is false for a few reasons. First, it ignores so-called "individual rights" cases such as Franz, discussed above, where the rights at issue are those of one individual versus another individual. It is simply not correct to view all disputes about constitutional rights as a zero-sum game where every victory for the government is a further restriction on the individual. This is so not only because government is often protecting some individuals vis-a-vis others, but also because, as pointed out above, "among our constitutional

[41] Anyone reading Judge Bork's concurrence will also realize how ridiculous is Public Citizen's claim that Judge Bork's separate concurring opinion "reads more like a dissent." The most eloquent testimony to the mildness of Judge Bork's statement is that Judge Edwards says nothing about it in his majority opinion. Compare, e.g., Franz v. United States, 707 F.2d 582, Supplemental Opinion, 712 F.2d 1428 (D.C. Cir. 1983), Hanoch Tel-Oran v. Libyan Arab Republic, 727 F.2d 774 (D.C Cir. 1984), cert denied, 470 U.S. 1003 (1985), Persinger v. Islamic Republic of Iran, 729

freedoms or rights, clearly given in the text, is the power to govern ourselves democratically."[42]

Judge Bork's view that majorities are entitled to govern through democratic institutions subject to express constitutional limitations leads him to reject the inventing of heretofore unknown "rights" -- rights enforced against government in the name of the Constitution but which have no demonstrable connection with that document. Judge Bork has been equally critical of the Supreme Court's willingness in the past to invalidate federal and state economic regulations in the name of substantive due process rights to economic liberty and property.

But as demonstrated by his concurrence in Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984)(en banc), cert. denied, 471 U.S. 1127 (1985), Judge Bork's refusal to create new rights is coupled with a determination to give full force to those provisions included by the Framers in the Constitution. As Judge Bork put it:

> In a case like this, it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know.

750 F.2d at 995

In short, Public Citizen confuses Judge Bork's refusal to create new rights with his vigilance in the enforcement of already-existing ones. Thus, in Silverman v. Barry, 727 F.2d

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[41] (Cont.) F.2d 835, cert. denied, 469 U.S. 881 (1984).

[42] Bork, The Struggle Over the Role of the Court, National Review 1137, 1139 (September 17, 1982).

1121 (D.C. Cir. 1984), Judge Bork neither created a new right, nor did he take an inappropriately expansive view of the takings clause. In fact, as Public Citizen conveniently forgets to mention, the case arose only in the context of a challenge to the district court's jurisdiction.[43] The issue was only whether the takings claims --which were of course based on the clear, express language of the Fifth Amendment -- were "obviously frivolous." 727 F.2d at 1124. By neglecting to mention this key point (as well as the fact that Judges Wright and Mikva joined Judge Bork's opinion), Public Citizen continues its misguided attempt to portray Judge Bork as biased.

The final case Public Citizen uses to justify its incredible claims that Judge Bork manipulates the doctrine of judicial restraint on behalf of business interests is Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (1984) (en banc). First, the plaintiff was an individual. The cattle ranch allegedly occupied by the United States government was his home. Judge Bork joined Judge Scalia's dissent, arguing that the plaintiff did not have standing to sue to enjoin the military from occupying his home. The dissent did state, however, that Ramirez had a claim for monetary relief against the federal government. This case provides a further example of the "damned-if you-do, damned-if-you-don't" position these reports take towards all of Judge Bork's opinions. Had Judge Bork voted to deny to the plaintiff in Ramirez any claim at all, his opinion would have

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[43] If Public Citizen were careful -- or honest -- Silverman would be considered a case in which Judge Bork had granted access to a plaintiff.

been characterized as pro-executive and anti-individual. Had he voted with the majority in Ramirez, his opinion would have been characterized, as it is now, as a "pro-business" vote. Public Citizen does not mention that the majority's position was arguably even more protective of business rights, for the majority voted that Ramirez had standing to sue the government for an injunction.[44]

To get maximum anti-Bork mileage from this case, however, Public Citizen mentions it in the text as a pro-business case, but includes it in its tables as a refusal on Judge Bork's part to grant access to a plaintiff. By shifting categories from parties to issues, Public Citizen further attempts to mislead the wary reader. In this section Ramirez is depicted as an example of Judge Bork helping the rich businessman, but later it is used supposedly to prove that Judge Bork slams the courthouse door on the fingers of poor deserving plaintiffs.

3. First Amendment

Judge Bork's record on the first amendment is unassailable. He has repeatedly shown himself to be highly protective of press freedoms and hostile to government censorship of the editorial process. His position on the constitutional protection available to the press in libel actions goes well beyond that of the Su-

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[44] Both the AFL-CIO and the Students' report treat this case as a denial of civil rights. In fact, as noted above, Judge Bork's difference with the majority was as to which remedy was available -- not whether a remedy was available.

preme Court,[45] and he has shown himself a consistent foe of government intervention in the editorial process of broadcasters, again urging a degree of protection beyond that available under prevailing Supreme Court doctrine.[46] Although his oft-cited article, Neutral Principles and Some First Amendment Problems,[47] advanced a theory of the first amendment that supplied protection only to speech that was "explicitly political," Judge Bork has since reconsidered this theory and has shown himself very willing to protect broad categories of speech from censorship.[48] His opinions in general have been extremely thoughtful, and his open-mindedness is well-illustrated by both his vigorous support for the rights of those with whom he might not agree[49] and his willingness to rule against those with whom his ideas might be more in sympathy,[50] if that is what the law requires in each case. Despite the undisputable quality of his record in this area, the

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45 See Ollman v. Evans, 750 F.2d 970 (1984) (Bork, J., concurring); see also McBride v. Merrell Dow and Pharmaceuticals Inc., 717 F.2d 1460 (D.C. Cir. 1983).

46 See, e.g., Branch v. FCC, No. 86-1256 slip op. (D.C. Cir. July 21, 1987); TRAC v. FCC, 801 F.2d 501 (D.C. Cir. 1986); Loveday v. FCC, 707 F.2d 1443 (D.C. Cir. 1983).

47 47 Ind. L.J. 1 (1971) ("Neutral Principles").

48 See, e.g., FTC v. Brown & Williamson Tobacco, 778 F.2d 35 (D.C. Cir. 1985) (commercial speech); Quincy Cable TV v. FCC, 768 F.2d 1434 (D.C. Cir. 1985) (general cable television programming); McBride v. Merrell Dow and Pharmaceuticals Inc., 717 F.2d 1460 (D.C. Cir. 1983) (scientific speech).

49 See, e.g., Lebron v. Washington Metropolitan Transit Authority, 749 F.2d 893, 896 (D.C. Cir. 1984) (ordering the Washington, D.C. subway system to display an anti-Reagan poster).

50 See, e.g., Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1986) (finding that a conservative group had no right to picket the Soviet and Nicaraguan embassies).

reports of Public Citizen, the AFL-CIO, the ACLU, and Senator Biden's consultants, due to a complete misunderstanding or outright misrepresentation of Judge Bork's views, thoroughly distort his commitment to the principles of free expression.

At a theoretical level, Public Citizen erroneously suggests that Judge Bork was not sincere in his 1984 recantation of the view expressed in his Neutral Principles article that the first amendment protects only "explicitly political speech." (Public Citizen, at 66).[51] The study bases its assertion on Judge Bork's 1985 interview in Conservative Digest, in which he states: "I finally worked out a philosophy which is expressed pretty much in that 1971 Indiana Law Journal piece [Neutral Principles] which you have probably seen." (Public Citizen, at 66) The Neutral Principles article, however, advanced both the general judicial philosophy of interpretivism and the specific theory that the first amendment would protect only speech that was "explicitly political." While Judge Bork has reconsidered his specific views on the first amendment, he has never disclaimed the part of the Neutral Principles piece that explicates his philosophy that interpretivism represents the only legitimate mode of constitutional decision making by judges. By asserting that Judge Bork suggested his continued adherence to the former, rather than the latter, aspect of Neutral Principles, Public Citizen completely distorted the context of the quote upon which

[51] On this issue, the AFL-CIO study merely asserts that Judge Bork "has been very unclear as to whether he still views [the Neutral Principles position on explicitly political speech] as valid." (AFL-CIO, at 11-12). Like Public Citizen, the ACLU and the Biden reprt argue that Judge Bork remains of the view that

it relies.[52]

In fact, Judge Bork has repudiated his 1971 view that the first amendment protects only "explicitly political speech." To be sure, he has not retreated from the basic view that the extremely broad wording of the first amendment requires judges to examine the values underlying it in order to distinguish between protected speech and the myriad of unprotected human activities. No serious constitutional scholar would. To understand the necessity of this endeavor, one must think only of certain activities that nominally appear to be "speech," but which cannot be and have never been construed to be protected by the first amendment. For example, no one would seriously contend that the first amendment protects a conspiracy to commit murder, a price fixing agreement among businessmen, a bank robber yelling, "Stick 'em up" or, to borrow Justice Holmes' oft-cited example, shouting "fire" in a crowded theater.

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[51] (Cont.) only purely political speech merits first amendment protection. (ACLU, at 27; Biden Report, at 53-56).

[52] It is worth quoting the passage in full:

> **Q. What four or five books most powerfully influenced your judicial/legal philosophy?**
> **A. What influenced it primarily was a seminar I taught with Alex Bickel in which we argued about these matters all the time. We taught it for seven years, and I finally worked out a philosophy which is expressed pretty much in that 1971 Indiana Law Journal piece which you have probably seen -- Neutral Principles And Some First Amendment Problems.**

McGuigan, "Judge Bork is a Friend of the Constitution," Conservative Digest, at 101 (Oct. 1985). The quote lifted from it by Public Citizen is an obvious reference to the development of Judge Bork's "judicial/legal philosophy" of interpretivism, not the narrower point of first amendment theory discussed in the Neutral Principles article.

Because this constitutional reality inescapably requires the courts to distinguish between protected and unprotected speech, Judge Bork has sought to discern what values or "neutral principles" the Framers intended to be used in interpreting that constitutional provision. He has searched for meaning in the first amendment by examining it in the broader context of the representative form of government established in the Constitution.[53] From this examination, Judge Bork has concluded that the "political function of speech is the only aspect of it -- we govern ourselves -- that differs from other human activities" and, therefore, that "political speech -- speech about public affairs and public officials -- is at the core of the [first] amendment." Worldnet Panel Discussion, at 29 and 25, June 10, 1987 (U.S. Information Agency). This does not mean, however, as Public Citizen suggests, that Judge Bork remains of the view that only explicitly political speech is protected. Judge Bork takes a very practical view of the role of a judge, and, from his experience and the responses of scholars to his 1971 article, Judge Bork has reconsidered that position "to the extent that, in an effort to find a bright line, I said the First Amendment ought to protect only political speech." Id. Instead, he now takes the broader view that the nature of public discourse protected by the first amendment must be construed to "spread out" to moral, scientific, literary, and other forms of speech. Id.; see also Bork, "Judge Bork Replies," 70 ABA Journal 132 (Feb. 1984). This

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[53] Indeed, he shares Columbia Law Professor Charles Black's view that, if the first amendment were not explicitly in the Constitution, it could be inferred from the structure of the document.

is in keeping with the theory he expressed in Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), that a judge must sometimes protect what might otherwise be unprotected speech in order to guarantee the freedom of the speech at the core of the first amendment.

Thus, when Public Citizen charges that "it is impossible to be certain" how Judge Bork would rule in a case "that involved exclusively artistic or literary expression," that group is once more guilty of suppressing the facts. Although he concedes that no line can be drawn "with great precision," Judge Bork would distinguish between protected and unprotected discourse at the point at which "speech" becomes "purely a means of self-gratification." Worldnet Panel Discussion, at 25, June 10, 1987 (U.S. Information Agency). In this vein, he has explicitly put "fiction" on the protected side of the line, and he has deemed unprotected only "art and literature . . . which are pornography and things approaching it." Id. Thus, those who suggest that Judge Bork would callously stand by while true art and literature are ripped from the galleries and libraries in fact have nothing to fear from Judge Bork. To be sure, Judge Bork would permit the community to express its views on such things as pornographic and obscene books, peep shows, nude dancing and similar forms of human gratification. Surely, fitness for the Supreme Court cannot be made to depend on the belief that such activities have been ennobled and enshrined in the first amendment to our Constitution.

If the critics are concerned, moreover, that Judge Bork would accept the suppression of legitimate art and literature in the guise of upholding laws reaching pornography and obscenity, the answer is simply that the line between the protected and unprotected is difficult for any judge to draw. As noted, Judge Bork himself has conceded that the line cannot be drawn "with great precision." But the standards employed by the Supreme Court over the past several decades have proven no more precise than anything Judge Bork would apply. Speaking from the candor of sincere frustration, Justice Stewart once summarized the mode of reasoning behind the Supreme Court's obscenity jurisprudence as being no more than applying the standard: "I know it when I see it." Jacobellis v. Ohio, 383 U.S. 413 (1966) (Stewart, J., concurring). Although the line drawing will remain difficult, as under the Supreme Court's current cases, it is clear that Judge Bork would not permit the suppression of a work, which, taken as a whole, has serious literary, artistic, political, or scientific value, since these will invariably lead to societal self-examination. See Miller v. California, 413 U.S. 15 (1973). Thus, while the marginal cases would, as now, be difficult, Judge Bork would plainly have no trouble voting to protect the social satire of Gulliver's Travels, but, at the same time, he would permit a State to regulate or ban the sale of Hustler magazine.

Some of the groups have also made an issue of Judge Bork's criticism of Cohen v. California, 403 U.S. 15 (1971), a case in which the Supreme Court held that the Constitution protects wearing a jacket that says "F*** the Draft" into a court of law.

(ACLU, at 3 & n.12 ; AFL-CIO, at 12 n.7). The groups suggest that because the nature of the speech in Cohen was "political," the Supreme Court properly held that it was protected. This misses the point. First, the law at issue in Cohen did not attempt to suppress political speech, but merely sought to maintain the decorum of the court. The need for courts to operate effectively means that, generally speaking, conduct in a court is heavily regulated. Surely, the Supreme Court would not invalidate a judge's holding someone in contempt for interfering with a trial, for refusing to give a nonprivileged answer, or for a host of other kinds of behavior. Thus, in deciding that the state court could not regulate this particular instance of profane, disruptive behavior, the only rule of decision that the Supreme Court seemed to be applying was that its moral judgment about the value of the speech at issue was superior to that of the state court in which the offending jacket was worn.[54] This was all that Judge Bork's criticism asserted. Second, the Court's imposition of its own morality in the name of the first amendment was too much even for that champion of broad first amendment freedoms, Justice Hugo Black, who joined Justice Blackmun and Chief Justice Burger in dissenting from the majority's decision. Third, the distinguished Yale Law School Professor, Alexander Bickel, who argued the Pentagon Papers case for the New York Times, also criticized Cohen. He wrote that

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[54] Indeed, the Court's opinion asserted as much, stating that "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another man's lyric." 403 U.S. at 25.

"there is such a thing as verbal violence, a kind of cursing assaultive speech that amounts to almost physical aggression." A. Bickel, The Morality of Consent 72 (1975). Like Judge Bork, Professor Bickel distinguished between "carrying a sign in public that says, 'Down with the Draft,' and a sign that says -- I bowdlerize -- fornicate the Draft." Id.

The study also takes Judge Bork to task for his criticism of the "clear and present danger" test for determining when subversive speech may be suppressed. (Public Citizen, at 66)[55] This objection to Judge Bork's views seems particularly misplaced in that nine justices of the Supreme Court voted to abandon the "clear and present danger" standard in Brandenburg v. Ohio, 395 U.S. 444 (1969). The standard established in Brandenburg permits a State to "forbid or proscribe advocacy of use of force or of law violation . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Thus, when Public Citizen notes with chagrin that Professor Bork, in Neutral Principles, argued that protected speech does not include such advocacy of forcible overthrow or violence, its only quibble must be that Judge Bork would give deference to the accountable, democratic branches of government, rather than rely on an unelected, life-tenured judiciary to determine (in hindsight) when advocacy of force or of

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[55] Other studies also criticize Judge Bork's views on "clear and present danger." See ACLU, at 25-27; AFL-CIO, at 11.

lawlessness poses an imminent threat to society.[56] The question comes down to whether we are compelled to wait for the apocalypse before defensive action is tolerated. Judge Bork believes not.

In this view, he is certainly not alone. In United States v. Dennis, 183 F.2d 201, 212-13 (1950), aff'd, 341 U.S. 494 (1951), for example, Judge Learned Hand wrote an opinion upholding the constitutionality of the Smith Act, which proscribed conspiracy to "teach and advocate the overthrow" of the government "by force and violence." Judge Hand argued that

> we may insist that the rules of the game be observed, and the rules confine the conflict to weapons drawn from the universe of discourse. The advocacy of violence may, or may not, fail; but in neither case can there be any "right" to use it. Revolutions are often "right," but a "right of revolution" is a contradiction in terms, for a society which acknowledged it, could not stop at tolerating conspiracies to overthrow it, but must include their execution.

Professor Bickel has also questioned the very premise that we, as a society, should tolerate subversive speech if the end result would be horrors such as totalitarian dictatorship or genocide.

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[56] In his Neutral Principles article, Judge Bork observed that by focusing on the clear and present danger of a single instance of speech, the Supreme Court's old test misses the fact that "the legislature is not confined to consideration of a single instance of speech or a single speaker. Cumulatively these may have enormous influence, and yet it may be impossible to show any effect from any single example. . . . Because the judgment is tactical, implicating the safety of the nation, it resembles very closely the judgment that Congress and the President must make about the expediency of waging war, an issue that the Court has wisely thought not fit for judicial determination." 47 Ind. L. J. at 33. Similarly, in a 1978 speech at the University of Michigan, Professor Bork argued that it makes little sense to require the democratic branches of government to let subversive advocacy go unchecked until it actually produces the harm advocated, a harm that society has the right to prevent. He stated: "Speech of that nature, . . . [i]f it is allowed to proliferate and social or political crisis comes once more to the nation, so

A. Bickel, Morality of Consent 72 (1975).[57] Surely, Judge Bork has not taken a position at odds with these and other respected constitutional scholars when he has stated that government "[i]ntervention [in the competition of speech and ideas] is permitted in only the most serious and imminent cases of market failure -- when, for example, private groups try to use speech in an attempt to seize governmental power and close out adverse speech." R. Bork, Antitrust Paradox 424 (1978).

And few would fault Judge Bork for the view that "speech about the violent overthrow of government, particular[ly] when engaged in by a group which is secretive, subject to military discipline, and allied with a foreign power is not political speech in the constitutional sense because it is speech about breaking the political system and ending competing forms of political speech." Worldnet Panel Discussion at 27, June 10, 1987 (U.S. Information Agency). Indeed, Justice Frankfurter made quite similar points when upholding draconian registration and similar regulation of the Communist Party. Like Judge Bork, Justice Frankfurter believed that the "[m]eans for effective resistance against foreign incursion -- whether in the form of organizations which function, in some technical sense, as 'agents' of a foreign power, or in the form of organizations,

[56] (Cont.) that there really is a likelihood of imminent lawless action, it will be too late for law."

[57] Professor Bork made precisely this point in a 1978 speech at Michigan Law School. He stated that the clear and present danger test "argues that, according to the fundamental law of our nation, the theory of Marxist dictatorship imposed by force is at least as legitimate as the idea of a republican form of government. That political relativism was certainly foreign to

which, by complete dedication and obedience to foreign objectives, make themselves the instruments of a foreign power -- may not be denied to the national legislature." Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 96 (1962) (footnote omitted). Indeed, Justice Frankfurter went so far as to say that to find a constitutional bar to registration and disclosure in such circumstances "would make a travesty of [the first] [a]mendment and the great ends for the well-being of our democracy that it serves." 367 U.S. at 89.

More to the point, however, the citizens of this country are entitled to protection from those who would incite lawless behavior. If a state legislature has the right to outlaw certain conduct, such as drug abuse, for example, then it would seem to follow that the state also possesses a commensurate right to prevent people from encouraging the conduct that it is constitutionally able to prohibit. In short, Judge Bork does not believe that the first amendment protects those groups -- the Ku Klux Klan, Nazis, or Weathermen -- who would supplant our constitutional democracy with a pernicious form of totalitarian rule that forsakes the rights and freedoms of all citizens.[58]

The AFL-CIO study (at 11) and the ACLU's report (at 25) attempt to discredit Judge Bork's position on advocacy of

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[57] (Cont.) the Founders' thought, and ought to remain foreign to ours."

[58] The ACLU in fact criticizes Judge Bork for his view that the Nazis should not have been permitted to march in Skokie, Illinois, and criticizes Judge Bork because "[h]e found it 'remarkable' that 'the legal order' would assume 'that Nazi ideology is constitutionally indistinguishable from republican belief.'" (ACLU, at 26-27).

forcible overthrow and of law violation by citing the great movements of our era that have relied on civil disobedience to accomplish their ends. In particular, the studies both cite the civil rights movement under the Reverend Dr. Martin Luther King, Jr. and suggest that, under Judge Bork's view, Dr. King could have been arrested for urging civil disobedience against unjust laws. This criticism is misplaced. In a recent interview Judge Bork readily acknowledged the distinction between violent, lawless behavior and the kind of civil disobedience practiced by Dr. King and the civil rights movement, stating:

> There's a large difference between advocating that things be burned down or blown up and urging sit-in demonstrations. First, the civil-rights demonstrators of the 1950s and 1960s premised their advocacy on the theory that the laws against things like integrated lunch counters were unconstitutional. And second, in our system, often the only way to get a disagreement about constitutionality into the courts is to break the law, get arrested and then have the matter adjudicated.

Kramer, The Brief on Judge Bork, U.S. News & World Report, Sept. 14, 1987, at 22. Further, while the nobility of the cause advanced by Dr. King can be doubted by none, even under the current Brandenburg test, one such as Dr. King, whose oratory inspired many courageous people to break laws that they believed were unjust, would not have been shielded by the first amendment when he incited lawlessness. The Supreme Court does not and cannot condone lawlessness for a noble cause any more than it would for a cause, such as Nazism, that we would consider ignoble.

Thus, in Walker v. Birmingham, 388 U.S. 307 (1967), albeit in the context of disobedience to a court order enforcing an unconstitutional law, the Supreme Court made clear that the petitioners were not free to disobey the law, even for a good cause. A majority consisting of Justices Stewart, Black, Clark, Harlan, and White affirmed a finding of contempt against civil rights marchers and organizers for violating an order enjoining participation in or encouragement of mass street parades without a permit as required by city ordinance. Although the injunction was premised on the application of a constitutionally infirm law, Justice Stewart's opinion held that the proper course was to invoke a judicial remedy to challenge the invalid order and that the Court could not "hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets." 388 U.S. at 321.

The Public Citizen report also asserts that Judge Bork would permit government "spying on persons because they exercise their First Amendment rights." (Public Citizen, at 72 n.26) This criticism distorts Judge Bork's position. He did in fact oppose a nebulous law that would have prevented the government from gathering information on a person if the need for such intelligence was triggered solely by conduct that would be "protected by the Constitution."[59] Judge Bork takes the sensible

[59] ABA Standing Committee on Law and National Security, Law, Intelligence and National Security Workshop, at 61-62 (1979). Professor Bork's remarks at the ABA conference were based on his testimony on the National Intelligence Reorganization and Reform Act of 1978: Hearings on S. 2525 Before the Senate Select Comm. on Intelligence, 95th Cong., 2d Sess. 438 (1978). During his testimony, Professor Bork spun out the following hypothetical:

view that, if we as a society cannot stop subversive or lawless speech until it is about to produce results, we should at least be able to have warning, and to have warning, we need to be able to gather information about those who would plot in secret violently to destroy our system of government. Under Public Citizen's view, we could never take steps to defend ourselves from violent revolution until the first shot was about to be fired, nor could we learn whether the American Nazi Party was planning to engage in a wave of racial violence until the first wave was virtually upon us. It is difficult to believe that our Constitution establishes a mechanism that provides such absolute protection to its enemies.

The Public Citizen report also takes Judge Bork to task for his position "that Congress may not impose detailed limits on the executive's conduct of intelligence activities." (Public Citizen, at 72 n.26)[60] Professor Bork's comments on such matters

[59] (Cont.) "Suppose the person is advocating the violent overthrow of the U.S. Government or he is advocating genocide, the extermination of Americans belonging to particular racial or ethnic groups. Suppose, further, that the advocate is not a solitary crank but belongs to an organized group, one perhaps with links to a foreign power. That advocacy, as long as he is not inciting to imminent violence, that advocacy is now his constitutional right though it once was not. . . . Does the fact that we must let him speak mean that we may not keep that person and his group under any form of surveillance, however mild? Persons or groups who advocate violence might be quite dangerous. In the past groups advocating violent overthrow of the government have been used to recruit people for illegal underground work."

[60] Public Citizen even criticizes Judge Bork for supporting laws that would proscribe newspaper publication of national security information under certain circumstances. (Public Citizen, at 66 n.23) In the first place, Professor Bork's remarks were directed to the disclosure of national security information generally, and he did not single out newspapers. Second, in a per curiam opinion joined by Chief Justice Burger and Justices Stewart,

spoke to the question of foreign intelligence, that is, intelligence which is gathered "as part of the conduct of foreign relations and of the command of the military forces" and which directly or indirectly involves a foreign entity.[61] Among the measures criticized by Professor Bork was a warrant requirement for foreign intelligence surveillance. On this question, unlike Public Citizen, Justice Powell apparently understood the distinction between surveillance involving foreign, rather than domestic, activities. In an opinion striking down warrantless surveillance activities in a purely domestic context, Justice Powell took pains to distinguish the foreign situation, explicitly noting that the case neither addressed "the President's surveillance power with respect to the activities of foreign powers" nor presented "evidence of involvement, directly or indirectly, of a foreign power." See United States v. United

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60 (Cont.) Blackmun, Powell, and Rehnquist, the Supreme Court has expressly acknowledged that "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." Snepp v. United States, 444 U.S. 507, 509 n.3 (1980).

61 ABA Standing Committee on Law and National Security, Law, Intelligence and National Security Workshop at 62-63 (1979). His remarks echoed comments he had earlier given criticizing legislation that would sharply restrict the President's conduct of foreign intelligence activities and impose a warrant requirement on the nation's foreign intelligence surveillance activities. See National Intelligence Reorganization and Reform Act of 1978: Hearings on S. 2525 Before the Senate Select Comm. on Intelligence, 95th Cong., 2d Sess. (1978); see also Bork, 'Reforming' Foreign Intelligence, Wall Street Journal, Mar. 9, 1978.

States District Court, 407 U.S. 297, 308-09 (1972).[62]

More generally, Public Citizen does not, and could not plausibly, assert that the United States is constitutionally disabled from gathering foreign intelligence. That being given, it is well-established that the Constitution invests the President with broad latitude in the areas of foreign affairs and national security, and that Congress may not interfere in this constitutionally assigned sphere. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).[63] Indeed, as Chief Justice Warren, writing for Justices Harlan, Brennan, Stewart, White, and Clark, recognized, "because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature," the President must have broad discretion in matters involving foreign affairs. Zemel v. Rusk, 381 U.S. 1, 17 (1965). It is difficult, therefore, to take Public Citizen's concern on this point as a serious one.

Public Citizen also criticizes Judge Bork because "he is always careful to note that, to the extent that the First

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[62] At least two courts of appeals have held that no warrant is required of the executive in foreign intelligence surveillance cases. See, e.g., United States v. Butenko, 494 F.2d 593, 605 (3rd Cir. 1974) (en banc); United States v. Clay, 430 F.2d 165 (5th Cir. 1970).

[63] Among those who joined Justice Sutherland's opinion in Curtiss-Wright were Chief Justice Hughes and Justices Brandeis and Cardozo. Similarly, in Chicago & Southern Airlines v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948), Justice Jackson acknowledged that "[t]he President . . . possesses in his own right certain powers conferred by the Constitution as Commander-in-Chief and as the Nation's organ in foreign affairs." See also

Amendment extends any protection to the particular expression at stake, the expression was 'political.'" (Public Citizen, at 66)[64] The study claims that in "cases in which the expression could have been classified as artistic or scientific and given protection as such, Judge Bork has emphasized its political aspects in bringing it within the coverage of the First Amendment." (Public Citizen, at 67) It is true, as Public Citizen contends, that in finding that the first amendment gives an artist the right to display an anti-Reagan poster in the Washington subway, Judge Bork noted the fact that "the poster at issue here conveys a political message." Lebron v. Washington Metropolitan Transit Authority, 749 F.2d 893, 896 (1984). But this is precisely why Public Citizen's entire attack misses the mark. To Judge Bork, virtually all speech (with the notable exception of obscenity) is "political," for he believes it unworkable to exclude much of what is said, written, and otherwise communicated as irrelevant to society's governance of its own affairs. Does it really matter if Judge Bork uses explicit rhetoric stating that "non-political" categories of speech are protected or if instead he simply views as "political" those categories of speech that Public Citizen would label non-political? In either case, Judge Bork affords protection to scientific, literary, moral, and other kinds of speech that may not be explicitly political, but that he regards as "political"

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63 (Cont.) Haig v. Agee, 453 U.S. 280, 291-292 (1981).

64 Senator Biden's report makes the identical point. (Biden Report, at 55)

in the first amendment sense because of their relevance to the way we as a society order our affairs.

In this same vein, Public Citizen suggests that Judge Bork gave protection to scientific speech in McBride v. Merrell Dow and Pharmaceuticals Inc., 717 F.2d 1460 (1983), because he could find a way to characterize it as "political." (Public Citizen, at 67) First, it is worth noting that Public Citizen never asserts that the case is wrongly decided. Second, it is difficult to understand what Public Citizen has to fear from Judge Bork's having a broad view of what speech relates to public affairs and therefore merits first amendment protection. Third, Public Citizen's characterization of McBride again willfully distorts the facts. In support of its theory that Judge Bork protects only "explicitly political" speech, the study cites a passage of the case that examines whether the defendant had made himself a "public figure" by "thrust[ing] himself to the forefront of the public debate" on the particular scientific question at issue. 717 F.2d at 1466. This judicial inquiry is plainly required by the Supreme Court's landmark libel decision, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), in order to ascertain the degree of constitutional protection available to a defendant in a libel suit. Thus, the study takes a lower court's application of well-established Supreme Court precedent and manipulates it in an attempt to prove some sinister theory that Judge Bork cares only about "explicitly political speech."

The study similarly distorts Judge Bork's concurring opinion in Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984).

While charging him with disregarding the first amendment rights of federal employees except where political speech is concerned, the report willfully ignores the fact that Judge Bork was simply applying the governing Supreme Court precedent. Reuber involved the alleged speech-related dismissal of an employee by an agent of the federal government. Judge Bork observed that the employee would likely be unable to maintain the lawsuit if his "criticisms [merely] concern[ed] his employer's business judgment and integrity," but that he could if his "remarks were critical of the federal government." 750 F.2d at 1065. Judge Bork noted that the latter was "precisely the kind of speech that the first amendment was designed to protect." Id. In so concluding, Judge Bork was merely applying Justice White's majority opinion in Connick v. Myers, 461 U.S. 138, 147 (1983),[65] which held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," the first amendment does not prevent dismissal "in reaction to the employee's behavior." Public Citizen makes no mention of this controlling precedent.

Both Public Citizen and the AFL-CIO suggest that Judge Bork's decision protecting commercial speech in FTC v. Brown &

[65] The AFL-CIO report also criticizes Judge Bork's opinion in Reuber as insufficiently congenial to broad judicial remedies in first amendment cases. Although Judge Bork faithfully applied the Supreme Court's case of Mt. Healthy v. Doyle, 429 U.S. 274 (1977), and held that the plaintiff was entitled to reinstatement when unconstitutionally dismissed, he simply observed that the extraordinary remedy of an injunction should not be made available when, as in Reuber, the plaintiff could have been made whole by a damages remedy. This is a basic legal principle that is especially central in the employment context. It is hardly a basis on which to conclude that Judge Bork will be parsimonious

Williamson Tobacco, 778 F.2d 35 (D.C. Cir. 1985), constitutes an unprincipled exception to his first amendment philosophy, motivated by a result-oriented "solicitude" for "property rights or business freedoms."[66] This is yet another example of these reports' obfuscation and distortion of Judge Bork's theory of the first amendment. As the Supreme Court has noted, commercial speech is often intimately related to public affairs. Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 764-65 (1976), was a landmark decision reversing earlier cases that had found commercial speech unprotected. In that case, Justice Blackmun, writing for the Court, carefully emphasized that "[e]ven an individual advertisement, though entirely 'commercial,' may be of great public interest" and that the free flow of commercial information is "indispensable to the proper allocation of resources in a free enterprise system" and "to the formation of intelligent opinions about how that system ought to be regulated or altered." Thus, in the one recent instance in which the Court has extended first amendment protection to a significant new category of "speech," seven justices took an

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65 (Cont.) in providing remedies for the violation of first amendment rights.

66 The AFL-CIO also argues that Judge Bork's criticism of federal election campaign funding is rooted in some pro-business or pro-property bias. As with much of this study, such an assertion defies explanation. Judge Bork's criticism of Buckley v. Valeo, 424 U.S. 1 (1976), stems from his belief that it is inconsistent with the first amendment to interpose the government in regulating the political process. If, as the various groups claim, Judge Bork views "explicitly political speech" at the core of the first amendment, it is difficult to ascribe to him pro-business motives when he criticizes a pervasive and stifling scheme of regulation covering political speech.

approach wholly consistent with Judge Bork's philosophy.[67]

Judge Bork's record confirms that he does not find commercial speech to be an exceptional category devoid of relevance to public affairs. As Solicitor General, Mr. Bork filed an amicus brief in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), taking the position that the relationship of commercial speech to public affairs can bring it within the ambit of the first amendment. Solicitor General Bork, in an amicus submission unrelated to protecting federal programs, took a strong position against a ban on newspaper advertisement of attorney services. He argued that this ban on attorney advertising burdened the collective right of citizens to obtain meaningful access to the courts. He stated: "The right to speak, in this regard, is a right of the public to receive valuable information." The Supreme Court, in an opinion by Justice Blackmun, invalidated the ban on advertising, though on less sweeping grounds than those urged by Solicitor General Bork. Thus, Public Citizen and the AFL-CIO again mount baseless charges against Judge Bork when they claim that his position on commercial speech is a result-oriented exception to what they regard as his narrow view of the first amendment.

The various groups also charge that Judge Bork is not sufficiently protective of political protesters. As with their other claims, the case is made through the omission of crucial facts and the distortion of his record. Public Citizen, for

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[67] Justice Blackmun was joined by Chief Justice Burger and Justices Brennan, Stewart, White, Marshall, and Powell. Justice Rehnquist dissented, and Justice Stevens did not participate.

example, attacks Judge Bork for his position in White House Vigil for the ERA Committee v. Watt, 717 F.2d 568 (D.C. Cir. 1983), claiming that "[i]n dissent, Judge Bork would have forbidden individuals to keep parcels and leaflets with them" while protesting on the sidewalk in front of the White House. This opinion is not insensitive to protesters' rights. First, the case presented only the question whether the district court had abused its discretion in granting a preliminary injunction. When it came back to the D.C. Circuit on the merits, a different panel decided the case consistently with Judge Bork's position. See White House Vigil for the ERA Committee v. Clark, 746 F.2d 1518 (D.C. Cir. 1984). Second, Judge Bork and the majority, Democratic-appointees Judges Wald and Oberdorfer, agreed on virtually all of the issues in the case. Third, on the one point of disagreement, the majority expressly conceded the relatively tenuous nature of the relationship of "parcels deposited on the sidewalk to First Amendment rights." 717 F.2d at 573. Clearly, this case does not warrant the conclusion drawn by Public Citizen that Judge Bork is insensitive to the rights of protesters.[68]

Along the same lines, Public Citizen criticizes Judge Bork's dissenting position in CCNV v. Watt, 703 F.2d 586 (D.C. Cir.

[68] To support its theory, Public Citizen also cites Juluke v. Hodel, 811 F.2d 1553 (D.C. Cir. 1987), in which the court revisited the regulations governing the placement of parcels and structures on the sidewalk in front of the White House. Typically, the report never suggests that Juluke is wrongly decided. Moreover, the position that this case suggests an anti-protester bias is belied by the members of the panel. In voting to affirm the White House regulations as content-neutral time, place, and manner restrictions, Judge Bork joined an opinion by Carter-appointee D.C. Circuit Judge Harry Edwards, also joined by a visiting Kennedy-appointee from the Seventh Circuit, Judge

1983). First, taking Public Citizen's position seriously is made virtually impossible by the fact that seven members of the Supreme Court, including Justices Blackmun, Powell, and Stevens, agreed with Judge Bork's position. See Clark v. CCNV, 468 U.S. 288 (D.C. Cir. 1984).[69] Second, in a case that produced six separate opinions in the D.C. Circuit, Judge Bork's position commanded five of eleven of the votes, including that of Judge (later Justice) Scalia. Third, the government's conduct in the case did not ban protesting, but merely prohibited camping in Lafayette Park across the street from the White House. The Park Service had in fact given the plaintiffs a permit to conduct an around-the-clock demonstration against the Reagan Administration in Lafayette Park and to set up a two "tent cities" to dramatize the plight of the poor and homeless. The Park Service, however, drew the line when the plaintiffs insisted that anti-camping regulations had to be suspended because their protest could not be fully effective if they were not permitted to engage in the "symbolic speech" of actually sleeping in the tents. It is difficult to take seriously, therefore, Public Citizen's claim that Judge Bork's position upholding the Park Service evidences some systematic hostility to protesters.

Last and most important among the protester cases criticized by Public Citizen is Finzer v. Barry, 798 F.2d 1450 (D.C. Cir.

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[68] (Cont.) Luther Swygert.

[69] Justice White's opinion was joined by Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, Stevens, and O'Connor.

1986).[70] In this case, Judge Bork ruled against Father David Finzer, who challenged a law that prevented the members of the conservative activist group of which he was chairman from protesting outside the Nicaraguan and Soviet embassies. Rather than applauding Judge Bork's open-mindedness and lack of result orientation, however, Public Citizen attacks Finzer as an anti-first amendment case without even mentioning that Judge Bork ruled against a conservative plaintiff and cause. This sharply contrasts with Public Citizen's approach to his concurrence in Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), a landmark libel opinion widely hailed in liberal circles. See, e.g., Anthony Lewis, Freedom, Not Comfort, New York Times, Dec. 10, 1984, at A23. In that case, the study charged that Judge Bork had ruled in a deliberately ambiguous way to introduce "an element of judicial subjectivity" that would permit him to rule in favor of conservative columnists and against a Marxist professor. (Public Citizen, at 74-75) Had Judge Bork's vote been reversed in both cases, it is clear that he still would have been criticized by Public Citizen for assisting a conservative colleague and for not sufficiently protecting first amendment values. Under Public Citizen's slanted methodology, he simply cannot win.

On the merits, Public Citizen charges that "Finzer illustrates that Judge Bork looks beyond the text of the Constitution and the intent of the Framers to find essentially personal values in the Constitution." (Public Citizen, at 71)

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[70] Other reports also make more restrained criticisms of Judge Bork's opinion in Finzer. See ACLU, at 23 n.83; AFL-CIO, at 14.

This charge is baseless. Judge Bork applied standard first amendment analysis and forced the government to prove that the law prohibiting hostile protests within 500 feet of a foreign embassy was narrowly tailored to serve a compelling governmental interest. Judge Bork did not blithely accept the asserted interest of fulfilling the nation's international law obligations to preserve the safety, peace, and dignity of foreign emissaries, but instead exhaustively canvassed leading authorities on international law, the available evidence of the Framers' views regarding the protection to foreign emissaries, and the history of such protection beginning with the founding of the Republic. 798 F.2d at 1455-58. While Judge Bork deferred to the political branches in their factual judgment that certain measures were necessary to fulfill the international obligations, he still conducted a careful and searching examination of the above-cited sources to confirm the legal basis for the assertion that these obligations existed and were to be regarded as constitutionally compelling. This mode of reasoning is a far cry from finding constitutional law in one's own conception of the good, and bears no relation, as Public Citizen charges, to the noninterpretivist creation of values such as a generalized constitutional privacy right to abortion or to homosexual sodomy. (Public Citizen, at 71-72)

Misconstruing the dissenting opinion in Finzer, Public Citizen also argues that the ordinary rule of judicial deference to the judgment of the political branches in the realm of foreign affairs does not obtain where the first amendment is concerned.

First, far from claiming that a court should not exhibit deference to the evidence proffered by the political branches to show "that an asserted justification really exists," the cited passage from the dissent makes only the more modest claim that the government had offered the court no facts or evidence to which to defer on the particular point at issue. 798 F.2d at 1489. Second, Public Citizen's criticism contradicts Justice Jackson's position that courts are ill-suited to second-guessing the judgment of the political branches in matters of foreign affairs. Chicago & Southern Airlines v. Waterman S.S. Corp., 333 U.S. 103, 190 (1948). Third, Public Citizen's position ignores a considerable body of first amendment precedent in which the Supreme Court has given deference to the judgment of the political branches on questions relating to national security. See Greer v. Spock, 424 U.S. 828 (1976); Secretary of the Navy v. Averch, 418 U.S. 676 (1974); Parker v. Levy, 417 U.S. 733 (1974).[71] Fourth, Judge Bork's opinion in Finzer was careful to emphasize that the courts owed deference only to the political branches' "factual discussion of the nature and depth of the foreign relations interests that are involved" and that the court did not have to defer "to the government's legal judgment that the statute is constitutional." 798 F.2d at 1460. Indeed, even

[71] Public Citizen contends that this deference should be questioned because Congress has not found it necessary to prohibit protests at embassies and consulates outside the District of Columbia. (Public Citizen, at 69) As Judge Bork's opinion explains, however, this seeming discrepancy does not come from a lack of conviction that foreign emissaries need protection. Rather, Congress has been able to rely on state and local authorities to protect embassies outside the District of Columbia. 798 F.2d at 1463 n.9 (citing Concerned Jewish Youth v.

with respect to the government's factual judgment, Judge Bork emphasized that the deference due was "by no means absolute." 798 F.2d at 1459.[72]

Judge Bork's opinion is also attacked for leaving in place viewpoint discrimination. (Public Citizen, at 70 n.25) First, this criticism merely rehashes the argument over whether the government met its burden of showing a compelling state interest to which the restraint on free expression is narrowly tailored. Second, while making this criticism in Finzer, Public Citizen elsewhere does not credit, and, in fact, sharply criticizes Judge Bork for opposing viewpoint discrimination in the context of the fairness doctrine. Viewpoint discrimination is inherent in the imposition of all such federal right of reply obligations on broadcasters. An editor who provides one point of view on an issue of public importance has a legal obligation to present the opposing viewpoint. While the Supreme Court has refused to tolerate this governmental impingement on the editorial freedom of the printed press, see Miami Herald v. Tornillo, 418 U.S. 241 (1974), it has been rather more tolerant of such requirements when imposed on the broadcast media, see Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969). Judge Bork has repeatedly argued that

[71] (Cont.) McGuire, 621 F.2d 471, 475 (2d Cir. 1980)).

[72] Similarly, in Hohri v. United States, 793 F.2d 304 (1986), a lawsuit seeking compensation for the World War II internment of Japanese-Americans, Judge Bork dissented from the denial of rehearing en banc of a panel opinion that he criticized for implicitly adopting a constitutional standard that involved excessive deference to the political branches in the sphere of military judgment. The Supreme Court reversed the panel on the basis of a jurisdictional issue also raised by Judge Bork in his dissent from denial of rehearing en banc. United States v.

such restrictions on the freedom of the press should not be tolerated in either context. See Branch v. FCC, No. 86-1256, slip op. (D.C. Cir., July 21, 1987); TRAC v. FCC, 801 F.2d 501 (D.C. Cir. 1986); Loveday v. FCC, 707 F.2d 1443 (D.C. Cir.), cert. denied, 464 U.S. 1008 (1983). Rather than praising Judge Bork for his opposition to this more serious and pervasive form of viewpoint restriction, however, Public Citizen, in typical one-sided fashion, makes the absurd argument that he is merely opposing laws "designed by Congress to promote the First Amendment rights of those who do not own a television station."[73] To Public Citizen, then, a decision preserving the editorial discretion of the press should be viewed as hostile to the "First Amendment rights of those who do not own a [newspaper]."

Finally, Public Citizen assaults Judge Bork's opinion for leaving undisturbed another part of the statute that forbids anyone from congregating within 500 feet of the embassy without police permission. The study claims that, by leaving intact unfettered police discretion to determine who gets to engage in speech, Judge Bork has ignored clear first amendment precedent. In fact, Judge Bork did not leave this unfettered discretion intact, but gave the statute a narrowing construction to bring it in line with the Constitution. Contrary to Public Citizen's assertion, this is by no means inconsistent with first amendment precedent. See, e.g., Cox v. New Hampshire, 312 U.S. 569 (1941).

[72] (Cont.) Hohri, 107 S. Ct. 2246 (1987).

[73] Another facet of this attack on Judge Bork is that Public Citizen appears to be arguing that there is a constitutional right to present one's views on television. This is, to be

While in some instances, as in the case of a state law, a federal court is constitutionally disabled from supplying such a construction, see Lovell v. Griffin, 303 U.S. 444 (1938), that is certainly not the case in a case like Finzer, in which the D.C. Circuit was reviewing an Act of Congress. Public Citizen evidently believes that it is preferable for a court in a case like Finzer to resort to the extraordinary remedy of invalidating a federal statute, rather than following the general rule that such a course is to be avoided if possible through a narrowing construction.[74]

Public Citizen also attempts to portray an inconsistency between Finzer and Judge Bork's dissent in Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986). Public Citizen claims that Judge Bork's purported deference to the foreign policy judgment of Congress in Finzer is at odds with Abourezk because in the latter case Judge Bork permitted the executive to exclude aliens based on what the study suggests was a misreading of the underlying statute. The study claims that "because . . . Congress [had] acted to promote the right to exchange political views, Judge Bork . . . abandoned his deferential attitude" in Abourezk. (Public Citizen, at 72) This distorts the entire nature of the particular issue in Abourezk, which was simply whether a

[73] (Cont.) charitable, an imaginative construction of the first amendment.

[74] Despite the fact that it is a federal statute at stake, the dissent asserts that "only a narrowing interpretation by a state court or legislature can be relied on to qualify a potentially standardless restriction on speech so as to overcome a constitutional challenge." 798 F.2d at 1497. It is on this puzzling statement that Public Citizen relies in its criticism of

congressional statute had authorized exclusion of the aliens. Deference to Congress' judgment, simply put, has nothing to do with whether the executive branch has properly construed a statute. Indeed, to the extent that there was any first amendment issue in Abourezk, it was whether, under Judge Bork's reading of the statute, Congress could constitutionally permit the exclusion of aliens based on their political beliefs. On this point, Judge Bork had no problem accepting Congress' judgment, for Justice Blackmun's majority opinion in Kleindienst v. Mandel, 408 U.S. 753 (1972), was directly controlling precedent for the proposition that Congress could do so.[75]

In the area of libel, Judge Bork has shown great solicitude for the values of a free and vigorous press, and has gone well beyond the Supreme Court in protecting the press from harassing lawsuits. See Ollman v. Evans, 750 F.2d 970 (1984); see also McBride v. Merrell Dow and Pharmaceuticals Inc., 717 F.2d 1460 (1983). His landmark opinions have drawn widespread praise, some of the most effusive of which has come from liberal commentators, such as Anthony Lewis, who described Judge Bork's concurrence in Ollman as "an extraordinarily thoughtful judicial opinion." See Lewis, Freedom, Not Comfort, New York Times, Dec. 10, 1984, at A23. Similarly, libel lawyer Bruce Sanford said: "There hasn't been an opinion more favorable to the press in a decade." Public Citizen does not claim to disagree with Judge Bork's libel

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[74] (Cont.) Finzer.

[75] Justice Blackmun was joined by Chief Justice Burger and Justices Stewart, White, Powell, and Rehnquist.

opinions, nor does it dispute the judgment of the commentators that Judge Bork's libel decisions are landmarks in the jurisprudence of the first amendment. Although -- indeed, because -- these opinions dramatically rebut any assertion that Judge Bork evinces hostility to first amendment values, Public Citizen simply dismisses them all as cases in which the person suing has been attacked for "opposing business interests." (Public Citizen, at 74)

As with most of Public Citizen's outlandish and deceptive generalizations, its conclusion about Judge Bork's libel cases is drawn from a sample insufficient in size to support any meaningful conclusion. Of a sample of only two libel cases, only one of them, McBride, involved a business defendant. Accordingly, Public Citizen strains to supplement this sample with Moncrief v. Lexington Herald-Leader, 807 F.2d 217 (D.C. Cir. 1986), a libel case decided wholly on the procedural issue of amenability to suit in the District of Columbia. Public Citizen labeled this as a pro-business case because the defendant is a newspaper. Because most free press cases do involve newspaper or other media defendants, all of which are "businesses," the most avid champion of the free press would, under this methodology, be portrayed as a lackey of big business. This again illustrates the entirely misleading nature of Public Citizen's categories and their characterization of particular cases. Indeed, if Judge Bork had ruled for the plaintiffs in the same cases, then he undoubtedly would have been condemned as an enemy of the first amendment.

Nor is Public Citizen above insinuating that Judge Bork recused himself from the important libel decision, Tavoulareas v. Washington Post, 817 F.2d 762 (D.C. Cir. 1987), because it was a case in which a businessman was suing a business (the newspaper). The unfounded implication that, rather than choose between two business interests, Judge Bork felt compelled to sit out Tavoulareas, crosses all bounds of serious intellectual debate.

To their credit, certain of the other reports in fact have commented favorably on Judge Bork's libel opinions. (ACLU, at 23; AFL-CIO, at 12-13) Indeed, only the Biden report has raised general questions about Judge Bork's willingness to provide vigorous first amendment protections for the press. But the Biden report advances no serious argument that Judge Bork is not a friend of the press. In light of Judge Bork's unimpeachable record on libel and his hostility to government regulation of the editorial content of broadcasting, no other study even considered it plausible to argue that Judge Bork is anything but a champion of press freedom.

Because of the unquestionable quality of Judge Bork's record on the press, the Biden report is reduced to reliance on trivialities to make its untenable case. Without suggesting that Judge Bork thought that the case was wrongly decided, the Biden report complains that Judge Bork viewed the Supreme Court as having acted "too precipitously" in the Pentagon Papers Case.[76] Biden also takes Judge Bork to task for expressing "doubt" about two Supreme Court cases that had invalidated criminal penalties

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[76] New York Times Co. v. United States, 403 U.S. 713 (1971).

for publication of a rape victim's name and of information about a confidential inquiry into judicial misconduct, respectively. (Biden Report, at 51-52)[77] With regard to these cases, especially the former, it is ironic that those who have been so sharply critical of Judge Bork for his alleged insensitivity to privacy interests find fault with his mere suggestion that the Court may not have taken privacy interests sufficiently into account in these cases. Similarly, the Biden report criticizes Judge Bork for not being sufficiently zealous in compelling the government to disclose information in Freedom of Information Act cases. (Biden Report, at 52) The report erroneously suggests that these purely statutory cases have some bearing on Judge Bork's views on the first amendment rights of the press to gather information. They do not, of course, have any relevance whatsoever to his first amendment views.[78] In fact, Judge Bork apparently believes that the press has a first amendment right to gather information. In Saxbe v. Washington Post Co., 412 U.S. 843 (1974), although he was charged with defending the federal Bureau of Prisons' policy prohibiting press interviews with individual inmates, Solicitor General Bork did not argue that the press has no first amendment right to collect information from the government. Instead, he readily acknowledged that "excessive

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[77] The case involving the rape victim's identity was Cox Broadcasting v. Cohn, 420 U.S. 469 (1975), and the judicial investigation case was Landmark Communications v. Virginia, 435 U.S. 829 (1978).

[78] The Biden Report's contrary assertion is an unsurprising one, since that report defines the meaning of a case simply by its result -- who wins and who loses.

limitations on the ability to gather information would render the freedom to publish a hollow guarantee."

The Biden report also criticizes Judge Bork for stating that, on certain issues of press privilege, the Supreme Court "could go either way without endangering either of those profound values [of freedom of speech or the press]." (Biden Report, at 52) Because Branzburg v. Hayes, 408 U.S. 665 (1972), the landmark Supreme Court case holding that the press has no general first amendment privilege against disclosure of confidential sources to a grand jury, was a 5-4 decision, it is evident that Judge Bork was correct in his view of the closeness of the issue.[79] The Biden Report also supplies a long quotation from Justice Powell's concurrence in Branzburg and correctly notes that his opinion "illustrates Justice Powell's devotion to a case-by-case balancing approach." (Biden Report, at 53) The study then claims that this concurrence "contrasts sharply with Judge Bork's more narrow and absolute approach." Id. This assertion simply does not follow from Judge Bork's comments. To state that the Supreme Court could legitimately go either way in an area of law, far from evidencing an absolutist approach, demonstrates a sincere appreciation of the closeness and difficulty of the issues at stake and exhibits an open-minded willingness to be persuaded.

In sum, although the special interests have labored mightily to show that Judge Bork is not a zealous guardian of first

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[79] The majority opinion was written by Justice White, joined by Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist.

amendment freedoms, they have produced nothing but overblown and misleading rhetoric to support this charge. Judge Bork's record on the first amendment leaves no doubt that he will continue to be a daunting foe of censorship and a champion of freedom of speech and the press.

4. The Religion Clauses

The ACLU suggests that Judge Bork has "offered an interpretation of the religion clauses that is contrary to traditional legal thought and the weight of historical evidence." (ACLU, at 18) Upon examination it is evident that the ACLU reads much into Judge Bork's discussion of the religion clauses that simply is not there. For example, at one point in a speech, Judge Bork observed that the religion clauses "might have been read" in a particular way. The ACLU concludes from this that Judge Bork reads those clauses that way -- a leap nowhere justified by his actual remarks.

Moreover, what Judge Bork has said on religion is uncontroversial to all but those who take the most extreme view of the degree to which religion must be driven from public life. First, it need be said that Judge Bork has never published an article in this area, and has decided only one case. In that case, Murray v. Buchanan, 720 F.2d 689 (D.C. Cir. 1983), Judge Bork followed Supreme Court precedent, as he was bound to do, in joining a unanimous decision of the full D.C. Circuit and upholding the constitutionality of congressional chaplains. (Previously, in Marsh v. Chambers, 463 U.S. 783 (1983), the Supreme Court had upheld the constitutionality of a chaplain in a

state legislature.) The sum total of Judge Bork's religion clause "jurisprudence", upon which the ACLU builds its straw man, is three brief speeches containing very mild and familiar criticisms of the potential anomalies in the Court's religion cases. Notwithstanding the paucity of materials and the moderation of Judge Bork's views, the ACLU endeavors, through entirely inaccurate assertions (e.g., that Judge Bork supports school prayer) to create a false caricature of a religious extremist.

When he has spoken, Judge Bork has made the common-sense and widely-shared observation that there exists a tension between the two religion clauses. (ACLU at 19, n.67) The Court itself has recognized that this tension has led to decisions difficult to square with one another. See, e.g., Walz v. Tax Commission, 397 U.S. 664, 668 (1981). See also, Sherbert v. Verner, 374 U.S. 398, 414 (1963)(Stewart, J., concurring)(footnote omitted)("the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause").

Numerous commentators have also discussed this tension. See, e.g., Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. Pitt. L. Rev. 673, 674-75 (1980):

> . . . the Court's separate tests for the Religion clauses have provided virtually no guidance for determining when an accommodation for religion, seemingly required under the Free Exercise Clause, constitutes impermissible aid to religion under the Establishment Clause. Nor has the Court adequately explained why aid to religion, seemingly

> violative of the Establishment Clause, is not actually required by the Free Exercise Clause.

Professor Kurland, in "The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court," 24 Vill. L. Rev. 3, 15 (1978-79) wrote that:

> . . . the Constitution has been essentially irrelevant to the judgments of the United States Supreme Court in the areas designated freedom of religion and separation of church and state.

Professor Johnson's article, "Concepts and Compromise in First Amendment Religious Doctrine," 72 Cal. L. Rev. 817 (1984) observed that:

> The difficult body of doctrine derived from [the first amendment's religion clauses] seems to consist of contradictory principles, vaguely defined tests, and eccentric distinctions.

Former Solicitor General Rex Lee wrote in "The Religion Clauses: Problems and Prospects", 1986 B.Y.U. L. Rev. 337, 338 (1986) that:

> A decent argument can be made that the net contribution of the Court's precedents toward a cohesive body of law over the years [in the religion clause area] has been zero. Indeed, some would say that it has been less than zero, and that we would be further ahead not only in terms of what we can work with, but in terms of what we can understand, if the Court had waited another half century before it began deciding religion clause cases.

This tension often results in confusion and insoluble dilemmas. To cite but one example, the Court forces a State to extend unemployment benefits to an employee forced to leave his job because of his Sabbath observance, but prevents the State from requiring that employees be allowed to observe the Sabbath.

See Sherbert, 374 U.S. 398; Thornton v. Caldor, Inc., 105 S.Ct. 2914 (1985). Surely it is only logical to discuss these inconsistencies and explore a principled means of resolving this divergence.

To be sure, Judge Bork has criticized the Supreme Court's test in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). But Judge Bork's criticism of Lemon is by no means a unique or unusual position. As Professor Kurland noted, "the three-prong test has resulted in as much confusion and conflict under the establishment clause as the court's decisions under the free exercise clause." The Irrelevance of the Constitution, supra, at 18. The Court has itself abandoned or significantly downplayed the test in some important establishment clause cases. See Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); Larson v. Valente, 463 U.S. 783 (1982). Furthermore, many legal scholars and three sitting Justices -- Chief Justice Rehnquist, Justice Scalia and Justice White -- have expressed profound disagreement with the Lemon analysis. See Wallace v. Jaffree, 105 S.Ct. 2479 (1985) (Rehnquist, J., dissenting); id., (White, J., dissenting); see also Bradley, Imagining the Past and Remembering the Future: The Supreme Court's History of the Establishment Clause, 18 U. Conn. L. Rev. 827 (1986):

> At least eight of the nine current justices have expressed dismay and exasperation with the Court's church-state doctrine. See Wolman v. Walter, 433 U.S. 229, 255-66 (1976) (where five justices entered separate concurrences or dissents). 'Our decisions in this troubling area draw lines that often must seem arbitrary." Id. at 262 (Powell, J., concurring in part). See also Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor,

J., concurring); Meek v. Pittinger, 421 U.S. 349 (1975) (Rehnquist, J., concurring in the judgment in part and dissenting in part); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 813 (1973) (White, J., dissenting).

Moreover, the test, as Judge Bork proves, makes little sense. The first prong -- that the regulation have no religious purpose -- simply "cannot be squared with governmental actions we know to be constitutional."[80] These actions include practices such as opening court sessions with "God save the United States and this honorable court," including "In God We Trust," on coins and dollar bills, and issuing religious-oriented Presidential proclamations. The second prong -- that the principal effect of a law cannot be to advance or inhibit religion -- is similarly misguided, because the courts are unable to "quantify the effects of laws that are not on their face directed to religion," and because "the historical evidence cuts against this test too." Id. The third prong -- that the law may not promote excessive entanglement with religion -- is "impossible to satisfy. Government is inevitably entangled with religion." Id. Judge Bork cites several examples of this entanglement including the need to scrutinize religions in awarding tax exemptions and draft exemptions, and the need to ensure that religious schools meet state educational standards.

The ACLU criticizes these common sense remarks as extreme, saying that "Judge Bork's articulated philosophy would not permit the Supreme Court to overrule local laws that have an overtly

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[80] "Religion and the Law," speech given at the University of Chicago, Nov. 13, 1984, p. 5.

religious purpose." (ACLU, at 19) To be sure, Judge Bork, like all members of the Supreme Court, would permit some local laws with a religious purpose. For example, he might well permit a law with the expressly religious purpose of giving preferential treatment to Sabbath observers under an unemployment compensation scheme. This, of course, is precisely the result that the Court said was required under the free exercise clause in Sherbert; a case the ACLU elsewhere hails as a landmark case in the cause of religious freedom. This double-edged criticism illustrates both a certain schizophrenia on religious freedom and a propensity for overblown rhetoric. Indeed, the same "criticism" could be levelled at Justice Brennan, who has made clear his belief that the state may go beyond what is required by the free exercise clause. Of course, in each case a line must be drawn between the impermissible one of advancing religion and the permissible one of accommodating religion. But to convert Judge Bork's innocuous observation that some religious purposes are permissible into advocacy of a per se rule upholding any religiously motivated action is demagoguery of the worst sort.

The only case Judge Bork has criticized in this area (as opposed to the Lemon test) is Aguilar v. Felton, 105 S.Ct. 3232 (1985). In this 5 to 4 decision, a majority of the Court held unconstitutional under the establishment clause a New York program, subsidized with federal funds, in which public school teachers gave instruction to educationally-deprived children in private schools, including private religious schools. This program had been in operation for over 20 years, without a single

incident of any inappropriate mixing of religion and public activity. As the four dissenters recognized, it strains credulity to believe that the first amendment prohibits this kind of beneficial support for needy, deprived children. Indeed, it comes perilously close to creating a rule of hostility towards religion and exemplifies the problems with the Lemon test.

Chief Justice Rehnquist has listed some of the contradictions in the Supreme Court's approach:

> [A] state may lend to parochial school children geography textbooks that contain maps of the United States, but may not lend maps of the United States for use in geography class. A state may lend textbooks on American colonial history, but it may not lend workbooks in which the parochial schoolchildren write, rendering them non-reusable. A state may pay for bus transportation to religious schools, but may not pay for bus transportation from the parochial school to the public zoo or Natural History Museum for a field trip.

Wallace v. Jaffree, 105 U.S. 2479 (1985)(Rehnquist, J., dissenting)(citations and footnotes omitted). Is it any wonder that Judge Bork believes that the Supreme Court's religion clauses jurisprudence needs to develop a more coherent unifying principle?

What Judge Bork has not said, but what the ACLU accused him in its press release (although not in the report directly) of writing, is that "the First Amendment does not prevent states from imposing prayer in the public schools." (ACLU Press Release, at 2) The ACLU is somewhat more cautious -- and honest -- in its report, although it suggests that "if adopted, Judge Bork's position on the establishment clause could return prayer to the schools." (ACLU, at 20) Judge Bork has never said

any such thing. The ACLU derives its position from its incorrect assumption that there are only two views of the establishment clause: the totally separationist view of the ACLU or a view permitting prayer in schools. But there is a middle view and the Supreme Court has taken it. Compare Marsh v. Chambers, 463 U.S. 783 (1983) with Engel v. Vitale, 370 U.S. 421 (1962). It is therefore unfair, but perhaps not surprising, that the ACLU has raised the issue of school prayer when Judge Bork has never addressed it.

The ACLU also trots out the old horse that by failing to adopt the "wall of separation" metaphor, Judge Bork manifests a hostility to the true purpose of the establishment clause. But the Supreme Court has rejected this metaphor too, stating in a recent opinion that the Constitution does not "require complete separation of church and state: it affirmatively mandates accommodation, not merely tolerance, of all religions." Lynch, 465 U.S. at 673.[81]

The Supreme Court has set for itself the impossible and unrealistic task of eliminating all laws with a non-secular purpose while mandating accommodation of religion to allow for free exercise. Recognizing this, to the extent Judge Bork can be said to have adopted a position at all, he has advocated a more moderate position which acknowledges that religion is inevitably

[81] See also Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)("Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organization is inevitable . . . .[J]udicial caveats against entanglement must recognize that the line of separation, far from being a single 'wall' is a blurred, indistinct, and variable barrier depending

a part of public life, but still seeks to fulfill the historic purposes of the clauses. He has said nothing controversial in this area. The ACLU's concerns can only be understood by taking into account its advocacy of complete exclusion of religion from public life, a position the Supreme Court has never adopted. The ACLU is entitled to its unusual views, but it ought not to condemn all those who reject that position in favor of more conventional views.

C. Criminal Law

Each of the three reports focusing only on nonunanimous cases only portray Judge Bork as voting against criminal defendants one hundred percent of the time. In fact, Judge Bork has been involved in exactly two non-unanimous decisions on the merits, which highlights again the perils of examining only non-unanimous decisions to judge a judge. He is accused of "being willing to deviate from rules of judicial restraint in order to mold criminal jurisprudence to conform to his own preferences" (Public Citizen, at 76), but the facts contradict this rhetoric. Like all judges hearing automatic appeals in criminal cases, Judge Bork has generally sided with the government in criminal law and criminal procedure cases. However, he has not hesitated to overturn convictions (twice) when constitutional or evidentiary considerations compelled such a result. The most noteworthy feature of these cases -- consistent with his respect for democratically-expressed laws -- is his adherence to statutory requirements.

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[81] (Cont.) upon all the circumstances of a particular

In United States v. Mount, 757 F.2d 1315 (D.C. Cir. 1985), Judge Bork concurred in a panel opinion affirming defendant's conviction for making a false statement in a passport application. Judge Bork wrote separately to meet directly plaintiff's contentions that the trial court should have used its "supervisory power" to apply the exclusionary rule to suppress evidence seized in an allegedly illegal search in Great Britain by British police officers without American involvement.

Judge Bork relied on Justice Powell's opinion for the Supreme Court in United States v. Payner, 447 U.S. 727 (1980), to answer plaintiff's argument that the federal court's supervisory power over the administration of criminal justice did not permit the imposition of the exclusionary rule -- an issue the majority did not address, although the plaintiff had argued for it. The ACLU contends that the Supreme Court specifically disavowed Judge Bork's construction and quotes the Court to say that its "decision today does not limit the scope of the supervisory power in any way." (at 33) The Supreme Court's own words make clear that its decision about the supervisory power supports Judge Bork's interpretation:

> The District Court and the Court of Appeals believed, however, that a federal court should use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights. The United States contends that this approach -- as applied in this case -- upsets the careful balance of interests embodied in the Fourth Amendment decisions of this Court. In the Government's view, such an extension of the supervisory power would enable federal courts to exercise a standardless discretion in their application of the exclusionary

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81 (Cont.) relationship.")

> rule to enforce the Fourth Amendment. We agree with the Government.

447 U.S. at 733.

Judge Bork also wrote that:

> [w]here no deterrence of unconstitutional behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience even more than admitting the evidence.

757 F.2d at 1323.

This language, it is said, "may bode ill for the exclusionary rule in general." (Public Citizen, at 78) In fact, Judge Bork was only elegantly restating a rule the Supreme Court has made abundantly clear in numerous cases (see, e.g. United States v. Leon, 468 U.S. 897 (1984)) that deterrence of police illegality, not the maintenance of "clean" judicial hands, is the underlying purpose of the exclusionary rule. And, because actions by United States courts obviously do not deter foreign police, the court -- and Judge Bork -- was perfectly justified in his statement.[82]

In United States v. Singleton, 759 F.2d 176 (1985), yet another opinion that Judge Bork wrote and now-Justice Scalia joined, Judge Bork concluded that a previous decision of the appeals court on the validity of the identification evidence in issue prevented the district judge from reconsidering its

[82] Contrary to the ACLU's assertion, Leon does in fact hold that exclusion of evidence is not appropriate unless the remedy would have a deterrent effect. The entire decision speaks in terms of deterrence. The Court concludes that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion," 468 U.S. at 922 -- in other words, where there is no benefit of deterrence,

validity. Public Citizen and the AFL-CIO portray this decision as one where Judge Bork "found that even evidence which the trial judge had found to be unreliable could be admitted and used to convict a defendant." (Public Citizen, at 78) As usual, Public Citizen seeks to confuse rather than to contribute. First, a prior Court of Appeals panel, which did not include Judge Bork, had reversed the trial judge and found the evidence sufficiently reliable to support conviction. Second, the only issue before Judge Bork was whether the district court was free after the first appeals court had declared the evidence sufficient to reconsider the issue of reliability. The treatment of this case reveals another favored tactic of Public Citizen: statements in dissent are repeated, but no attempt is made to show that Judge Bork's decision in the case is incorrect.

Public Citizen concludes its all too brief discussion of Judge Bork's position on crime by citing United States v. Garrett, 720 F.2d 705 (1983), as a "further example of Judge Bork's willingness to come to the aid of the prosecution," (at 80). There, writing for a unanimous court, Judge Bork affirmed a lower court's rejection of a defendant's claim that the Speedy Trial Act required dismissal of his indictment because the grand jury had returned it thirty-one days, instead of thirty days, after his arrest. Judge Bork rejected the broad exceptions argued by the government and the one relied on by the lower court. Relying on the text of the statute and the legislative history, Judge Bork held that the lower court should have relied

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82 (Cont.) the criminal should not go free.

on the statutory provision which excluded delays caused by other proceedings against the defendant. Public Citizen suggests that the charge against the defendant, who was convicted of aiding in the transportation of a minor for prohibited sexual conduct for commercial exploitation, should have been dismissed because the government did not argue the correct exception, even though the statute did not require dismissal. Fortunately, Judge Bork refused to engage in such a strained reading of the statute in order to thwart criminal justice.

D. Civil Rights

1. Introduction

Critics of Judge Bork charge that he is an enemy of civil rights who would roll back the civil rights gains of the past thirty years. Typical of these claims is the statement that, "[t]hroughout his career, Judge Bork has opposed virtually every major civil rights advance on which he has taken a postion." (Biden Report, at 43) These charges are patently and demonstrably false. Judge Bork has consistently advocated positions that grant minorities and women the full protection of civil rights law. Both as Solicitor General and appellate court judge, Judge Bork has never advocated or issued a judicial opinion less sympathetic to the substantive civil rights of minority or female plaintiffs than the position taken by the Supreme Court or Justice Powell.[83]

[83] Of course, this does not include cases where Solicitor General Bork represented the United States in actions where claimants said federal laws or policies violated their civil rights. Unlike his other briefs, these filings do not reflect his legal views. The Solicitor General is obliged to defend the legality

As an appellate court judge on the D.C. Circuit, Judge Bork has consistently and forcefully vindicated the civil rights of parties appearing before him. In fact, during his tenure on the bench, Bork has ruled for the minority or woman raising substantive civil rights claims 7 out of 8 times.[84]

For example, in Emory v. Secretary of the Navy, 819 F.2d 291 (D.C. Cir. 1987), Judge Bork reversed the district court's decision dismissing a claim of racial discrimination against the United States Navy. In Laffey v. Northwest Airlines, 740 F.2d 1071 (D.C. Cir. 1984), cert. denied, 469 U.S. 1181 (1985), Judge Bork affirmed a lower court decision which found that Northwest Airlines had discriminated against its women employees. In Palmer v. Schultz, 815 F.2d 84 (D.C. Cir. 1987), he held in favor of women foreign service officers alleging discrimination by the State Department in assignment and promotion. In Ososky v. Wick, 704 F.2d 1264 (D.C. Cir. 1983), he voted to reverse the district court and hold that the Equal Pay Act applies to the Foreign Service's merit system. In Doe v. Weinberger, No. 84-5613, slip op. (D.C. Cir. June 9, 1987), he held that an individual discharged from the National Security Agency for his homosexuality had been illegally denied a right to a hearing. And in County Council of Sumter County, South Carolina v. United States, 555 F. Supp. 694 (1983), 696 F. Supp. 35 (1984) (per

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[83] (Cont.) of government actions, except for the most egregious cases. This total also excludes cases raising procedural, as opposed to substantive, questions in the interpretation of civil rights law.

[84] This figure excludes statements dissenting from denial of rehearing en banc, which are not opinions on the merits.

curiam), he held that the local county had failed to prove that its new voting system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote." These decisions held (among other important rulings) that inferences of intentional discrimination can be made based solely on statistical evidence, that Title VII's statutory limitations should be liberally construed, and that female stewardesses may not be paid less than male pursers in jobs that are only nominally different.

Indeed, his dedication to eradicating racial discrimination pursuant to constitutional command has been a fixed reference point for Robert Bork since his earliest days as a scholar. The fourteenth amendment, said Professor Bork in 1971,

> was intended to enforce a core idea of black equality against governmental discrimination. And the Court, because it must be neutral, cannot pick and choose between competing gratifications and, likewise, cannot write the detailed code the framers omitted, requiring equality in this case but not in another. The Court must, for that reason, choose a general principle of equality that applies to all cases.[85]

In his four years as Solicitor General, Judge Bork represented the United States in 20 substantive civil rights cases decided by the Supreme Court.[86] In 18 of these 20 cases, Bork's argument supported the civil rights plaintiff or minority

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[85] Bork, Neutral Principles and Some First Amendment Problems, 47 Ind.L.J. 1, 14-15 (1971).

[86] As noted, this total does not include cases where Solicitor General Bork represented the United States as a defendant or those which raise procedural questions.

interest.[87] The NAACP Legal Defense Fund sided with Solicitor General Bork in nine of its ten civil rights briefs in cases in which the Court made a substantive interpretation of federal statutory or constitutional law. Moreover, the Justice most consistently supporting Bork's Solicitor General arguments in civil rights cases was not William Rehnquist or Warren Burger, but William Brennan. Justice Brennan adopted Bork's position in 17 of 19 cases. By contrast, Justices Rehnquist and Burger rejected Bork's position more often than any other justice: a total of 11 out of 19 times. Furthermore, in 7 of the 16 cases in which Bork filed an amicus brief and Powell cast a recorded vote, Justice Powell opted for a narrower statutory or constitutional interpretation than that proposed by the Solicitor General. Justice Powell never voted for a statutory interpretation more liberal than that urged by Bork.

These 20 cases include a number of significant civil rights victories: Runyon v. McCrary, 427 U.S. 160 (1976) (affirming that Section 1981 applied to racially discriminatory private contracts); United Jewish Organizations v. Carey, 430 U.S. 144 (1977) (upholding race-conscious electoral redistricting to enhance minority voting strength); Lau v. Nichols, 414 U.S. 563 (1974) (holding that Title VI, and possibly the Fourteenth Amendment, reached actions discriminatory in effect, though not in intent); Corning Glass Co. v. Brennan, 417 U.S. 188 (1974)

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[87] In the two cases where Bork concluded that the defendant's view of the relevant civil rights provision was proper, the Supreme Court agreed with his position. City of Richmond v. United States, 422 U.S. 358 (1975); Milliken v. Bradley, 428 U.S. 717 (1974).

(Equal Pay Act interpreted to bar men from earning more than women for similar jobs on different shifts); Teamsters v. United States, 431 U.S. 324 (1977) (easing the burden for plaintiff to prove employment discrimination and gain relief by use of statistical evidence and discriminatory "effects" tests); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) (same); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).[88] In addition to his role in these civil rights victories, Bork has, on numerous occasions, advocated a broader interpretation of civil rights laws than either the Supreme Court or Justice Powell was willing to accept.[89]

In the face of Judge Bork's significant and longstanding support for civil rights, his critics are desperate for grounds upon which to portray Judge Bork as insensitive to civil rights. They have seized upon certain statements made by Judge Bork while in academic life critiquing particular Supreme Court decisions. But the critics fail to note that few, if any, of these cases are

[88] Other landmark civil rights cases argued by Bork include: Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Section 5 of the Fourteenth Amendment gives Congress sweeping remedial power, including power to abrogate sovereign immunity); Virginia v. United States, 420 U.S. 901 (1975) (Virginia not entitled to be relieved of the special burdens imposed by Section 5 of the Voting Rights Act); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (union loss of discrimination claim in arbitration does not bar employee from bringing Title VII suit).

[89] See, e.g., Beer v. United States, 425 U.S. 130 (1976) (rejecting 5-3 Bork's argument that a New Orleans, Louisiana reapportionment plan would dilute black voting strength); General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (rejecting Bork's argument that discrimination on the basis of pregnancy violated Title VII); Washington v. Davis, 426 U.S. 229 (1976) (rejecting Bork's argument that an employment test with a discriminatory "effect" was unlawful under Title VII); Teamsters v. United States, 431 U.S. 324 (1977) (rejecting Bork's argument that even

of any present import, either because they are firmly embedded in precedent or have been rendered superfluous by subsequent statutory enactments. Moreover, every single case Bork has criticized has also received criticism from other eminent constitutional scholars and jurists.

Most important, only one of these issues discussed by Bork directly relates to discrimination against minorities or women. Some of the criticized cases have absolutely nothing to do with racial discrimination. (See, e.g., Harper v. Virginia, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).) Another relates to congressional power over the judiciary, a principle that applies in many areas besides racial discrimination and was used as the basis for the proposed Human Life Bill which sought through legislation to overturn Roe v. Wade. (Katzenbach v. Morgan, 384 U.S. 641 (1966).) Yet others involve questions of state action, a doctrine that applies to any constitutional claim and therefore tells us nothing about Judge Bork's view of the equal protection clause itself. (See, e.g., Shelley v. Kraemer 334 U.S. 1 (1948); Reitman v. Mulkey, 387 U.S. 369 (1967).) Another case relates to the question of whether non-minority individuals possess a constitutional right to be free from racial discrimination (Regents of the University of California v. Bakke, 438 U.S. 265 (1978)).

The final issue concerns whether Judge Bork would apply heightened judicial scrutiny to classifications other than those

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89 (Cont.) a wholly race-neutral seniority system is unlawful if it perpetuates discriminatory effects).

based on race or ethnicity. As we show below, Judge Bork apparently believes that the equal protection clause applies to all individuals, and authorizes courts to strike down any classification that is not based on reasonable distinctions among people, but on individious discrimination, irrational prejudice, or outmoded stereotypes.

In sum, Judge Bork's civil rights record as a Solicitor Geneneral and appellate court judge is exemplary and cannot be tarnished by misleading criticism of Bork's most reasonable discussion, while in academic life, of highly controversial decisions having little to do with civil rights.

2. Voting Rights

The AFL-CIO criticizes Judge Bork for questioning "many of the landmark cases in the struggle for civil rights" (at 6), including Harper v. Virginia Bd. of Elections, 383 U.S 663 (1966), Katzenbach v. Morgan, 384 U.S. 641 (1966), and Reynolds v. Sims, 377 U.S. 533 (1964). The report states that these are "universally accepted precedents" and suggests that Judge Bork's criticism of them is not "within the spectrum of mainstream legal thought." (at 8) Similarly, the ACLU cites Bork's criticism of these three cases as evidence of its extraordinary claim that Bork's "conception of the Court's role is radically different from most, if not all, of the Justices who have sat on the Court in the past forty years." (at 3) See also Biden Report, at 44-45.

None of these claims can withstand scrutiny. First, to the extent that describing these cases as "civil rights" "landmarks"

is meant to suggest that Judge Bork's criticisms of them spring from a narrow view of the Fourteenth Amendment's protections against racial discrimination, any such description is quite misleading. None of these cases involved claims of racial discrimination. Thus, Judge Bork's criticism of them in no way detracts from his unwavering commitment to racial equality under the equal protection clause. Second, Judge Bork's concerns about these decisions are shared by some of the most respected jurists of this century. Thus, it is simply wrong to claim, as these reports do, that Judge Bork's criticism is extreme or unfounded.

Poll Taxes

In Harper, the Supreme Court invalidated Virginia's $1.50 poll tax. There was no claim that the poll tax had a discriminatory purpose or effect, and the decision expressly stated that this issue was irrelevant. Harper, 383 U.S. at 668. Rather, the Court established a per se ban against all poll taxes in every state regardless of whether they were being used, or had been used previously, as a pretext for racial discrimination. Thus, the decision itself makes plain that the case involved classifications based on wealth, not classifications based on race. Since Judge Bork has repeatedly stated that he would find racially discriminatory poll taxes unconstitutional, the reports plainly err in portraying Judge Bork's comments as anti-civil rights.

Bork is far from alone in his view that nondiscriminatory poll taxes are constitutional. In 1937, the Supreme Court unanimously rejected a similar challenge to Georgia's $1 poll

tax. See Breedlove v. Suttles, 302 U.S. 277 (1937). Thus, such distinguished jurists as Charles Evans Hughes, Louis Brandeis, Harlan Fiske Stone, Benjamin Cardozo, and Hugo Black agreed with Judge Bork's position. According to the unanimous Court:

> To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the State, and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate.

Id. at 283.

Similarly, in 1951, eight members of the Supreme Court summarily rejected a challenge to the law struck down fourteen years later in Harper. See Butler v. Thompson, 341 U.S. 937 (1951) (per curiam). Thus, in addition to Justice Hugo Black, who again adopted Judge Bork's position, Justices Felix Frankfurter, Robert Jackson, Stanley Reed, Harold Burton, Tom Clark, Sherman Minton, and Chief Justice Fred Vinson rejected the arguments accepted in Harper. Justice Douglas was alone in dissent.

Finally, in Harper itself, Justices Hugo Black, John Marshall Harlan and Potter Stewart dissented from the sweeping majority decision. Justice Black maintained that the Court was "using the old 'natural-law-due-process formula' . . . to write into the Constitution its notions of what it thinks is good governmental policy." And Justice Harlan protested that

> Property and poll-tax qualifications, very simply, are not in accord

> with current egalitarian notions of how a modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes. However, it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process.

Id. at 686. Respected constitutional scholars agreed. Professor Alexander Bickel said that Justice Black was right in complaining that the Court gave "'no reason'" for its decision, A. Bickel, The Supreme Court and the Idea of Progress 59 (1970), and Professor Archibald Cox, although ultimately defending the result, acknowledged that the opinion seemed "almost perversely to repudiate every conventional guide to legal judgment." A. Cox, The Warren Court: Constitutional Decision as an Instrument of Reform 125, 134 (1968).

Thus, it seems disingenuous, to say the least, for the AFL-CIO and the ACLU to suggest that Harper is "universally accepted" or that Judge Bork's criticism of Harper marks him as "radically different" from the Justices (or, for that matter, the constitutional scholars) of "the past forty years."

Moreover, the Supreme Court has refused to extend Harper's stated rationale that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." Id. at 668. For example, Harper's suggestion that wealth-based classifications are subject to heightened judicial scrutiny was firmly rejected by Justice Lewis Powell's majority opinion in San

Antonio School District v. Rodriquez, 411 U.S. 1 (1973). Similarly, notwithstanding Harper, the Supreme Court has subsequently upheld a number of state-imposed restrictions on voting. See Richardson v. Ramirez, 418 U.S. 24 (1974) (upholding prohibitions on voting by convicted felons); Oregon v. Mitchell 400 U.S. 112 (1970) (upholding minimum age requirements for state voters).

Finally, both reports completely ignore Judge Bork's 1973 testimony concerning Harper. Not only did Bork testify that the result in Harper may be justifiable under the republican form of government clause (depending on "the size of the poll tax"); he flatly stated: "I do not think it is an issue of any sort today and I certainly am not interested in reviving it as an issue." Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General, Hearings before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 17 (1973). This oversight, to put it as charitably as possible, results in a less than complete picture of Judge Bork's views.

Reapportionment

Although his critics notably fail to mention it, Judge Bork has never questioned the Supreme Court's landmark decision in Baker v. Carr, 369 U.S. 186 (1962), holding challenges to malapportioned legislatures justiciable. Thus, Bork's criticism of the Court was not for entering the "political thicket," but for imposing the rigid one man, one vote rule in Reynolds v. Sims, 377 U.S. 533 (1964). That fact alone demonstrates that his position, which is more expansive than that of Justices

Frankfurter and Harlan (who believed that courts could not inquire at all into the manner in which states conduct legislative apportionment), is well within the "mainstream." Beyond that, in criticizing Reynolds, Bork is joined by such eminent and mainstream jurists as Hugo Black and Potter Stewart. Similarly, academics such as Professor Philip Kurland have criticized the Warren Court for reading the doctrine of one man, one vote "into a Constitution which had clearly left the question of legislative apportionment to state legislatures." P. Kurland Public Policy, the Constitution, and the Supreme Court, 12 N.Ky.L.Rev. 181, 196 (1985).

Moreover, if logically applied, the one man, one vote rule would invalidate the United States Senate, which is composed of two Senators per State without regard to of population differences. Although the Court has rejected the "federal analogy" and invalidated state apportionment plans modeled after the United States Senate, one must assume that the Court would not strike down the Senate if the composition of that body were challenged on equal protection grounds. This logical incoherence casts doubt on the Court's rigid doctrine and illustrates that the principle is neither a prerequisite to fair democratic procedures nor supported by the history, structure or text of the Constitution.

But Bork's rejection of the one man, one vote rule does not mean that he would tolerate gross malapportionments of state legislatures. According to Bork, "there is a legitimate mode of deriving and defining constitutional rights, however difficult

intellectually, that is available to replace the present unsatisfactory focus." "The guarantee clause, along with the provisions and structure of the Constitution and our political history, at least provides some guidance for a Court." Neutral Principles and Some First Amendment Problems, 47 Ind.L.J. 1, 19 (1971). Bork's approach leads him to favor Justice Stewart's standard that legislative apportionment plans that are irrational and "permit the systematic frustration of the will of a majority of the electorate of the State" should be held unconstitutional. Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 753-754 (1964). Neither report makes mention of Bork's alternative approach.

Moreover, as it has become clear that the Court's decisions would require mathematical precision at the expense of legitimate state interests, several justices have articulated alternative approaches closer to the one endorsed by Judge Bork. In Kirkpatrick v. Preisler, 394 U.S. 526 (1969), the Court invalidated districts that varied from the ideal by up to 3.13%. Justices John Marshall Harlan and Potter Stewart dissented on the ground that "insistence on mathematical perfection does not make sense even on its own terms," avoiding "all thought of county lines, local traditions, politics, history, and economics . . . " Id. at 550. Justice Byron White also dissented, stating that he would accept, as a rule of thumb, variations between the largest and smallest districts of 10% and 15%. Id. at 553.

More recently, in Karcher v. Daggett, 462 U.S. 725 (1983), the Court invalidated New Jersey's reapportionment plan on the ground that the 0.6984% difference between the largest and

smallest districts did not achieve population equality as nearly as practicable. Justice Byron White, joined by Chief Justice Warren Burger, Justice Lewis Powell, and Justice William Rehnquist, dissented, arguing that the Court's rigid "demand for precise mathematical equality" does not permit legislatures to accommodate "legitimate noncensus factors" such as "the maintaining of compact, contiguous districts, the respecting of political subdivisions, and efforts to assure political fairness . . . ." Id. at 767-782. In a strongly worded separate dissent, Justice Lewis Powell doubted that the Constitution "could be read to require a rule of mathematical exactitude in legislative reapportionment," and charged that the Court's insistence on such a reading "is self-deluding." Id. at 784. These Justices, at least, would seem convinced of the wisdom of Bork's prediction that the one man-one vote principle would evolve into an unworkable "straitjacket."

Contrary to the distorted charges of the AFL-CIO, ACLU, and the Biden report, Judge Bork's criticism of Reynolds v. Sims is neither anti-civil rights nor out of the mainstream.

Katzenbach v. Morgan

In Katzenbach v. Morgan, supra, the Supreme Court upheld a provision of the Voting Rights Act prohibiting the use of English language literacy tests for any person who had completed sixth grade in Puerto Rico, whether or not there was any indication that such tests were used to discriminate. Just seven years earlier, however, the Court had rejected a fourteenth amendment challenge to a state's nondiscriminatory use of literacy tests.

Lassiter v. Northampton Election Bd. of Elections, 360 U.S. 45 (1959). Nevertheless, the Katzenbach Court upheld the prohibition on the ground that Congress' power to enforce the amendment was not limited to the Supreme Court's view of what that Amendment means.

Contrary to the reports' insinuations, Bork's objection to Morgan does not stem from opposition to congressional action taken to remedy the effects of past discrimination. Indeed, Bork testified in 1973 that South Carolina v. Katzenbach, 383 U.S. 301 (1966), which upheld Congress' suspension of the use of literacy tests in states with a history of discrimination, was rightly decided. As Bork has written, Congress may properly employ its remedial powers, as it did in South Carolina v. Katzenbach whenever it "attempt[s] to relate the prohibition [of literacy tests] to any criterion indicating the discriminatory use of literacy tests," -- even if Congress does so, as in that case, by adopting what amounts to a conclusive presumption of current discriminatory purpose based on past discrimination.

Thus, Bork's criticism of Morgan was in no sense anti-civil rights. It is only Morgan's suggestion that Congress may expand and redefine the substantive scope of the fourteenth amendment with which Bork disagrees. According to Bork, this rationale makes Congress, not the Court, the final arbiter of the meaning of the fourteenth amendment -- a position inconsistent with the power of judicial review as stated in Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803).

This objection is well within the mainstream of legal thought. In Morgan itself, Justices John Marshall Harlan and Potter Stewart dissented on the ground that the Court's decision was "at the sacrifice of fundamentals in the American constitutional system -- the separation between the legislative and judicial function . . . ." Id. at 659.

Significantly, Justice Powell adopted this very position in his dissent in City of Rome v. United States, 446 U.S. 156, 200 (1980), stating: "The preclearance requirement both intrudes on the prerogatives of state and local governments and abridges the voting rights of all citizens in States covered under the Act. Under §2 of the Fifteenth Amendment, Congress may impose such constitutional deprivations only if it is acting to remedy violations of voting rights." This is nothing less than a succinct restatement of Bork's views.

What is more, Bork's position on Morgan is seemingly shared by a majority of the Supreme Court which has refused to give effect to the Morgan principle in considering subsequent congressional legislation. For instance, four years after Morgan, in Oregon v. Mitchell, 400 U.S. 112 (1970), Chief Justice Warren Burger and Justices Hugo Black, Potter Stewart, John Marshall Harlan, and Harry Blackmun explicitly rejected the Morgan rationale in considering the constitutionality of Congress' attempt to lower the voting age in federal and state elections from 21 to 18.

It is also clear that Judge Bork's position on Morgan is thoroughly principled and in no way influenced by results. As

previously noted, in 1981 Bork testified before Congress against enactment of the Human Life Bill. Although acknowledging that Katzenbach v. Morgan could be read to support the constitutionality of the bill, he urged Congress to reject reliance on that decision, arguing that the bill would undermine "the Supreme Court's ultimate authority to say what the Constitution means." Similarly, in 1972, Professor Bork declined to rely on the Morgan power to support proposed legislation to restrict busing. According to Bork, "[d]evotees of [the Morgan] position, should conclude that the proposals are so clearly within Congress' power that no real question of constitutionality arises." Bork rejected this position, however, on the ground that Morgan "improperly converts Section 5, which is a power to deal with remedies, into a general police power for the nation."[90]

Thus, contrary to the reports' suggestions, Katzenbach v. Morgan is a highly controversial decision that now appears largely to be limited to its facts. Indeed, those who are more interested in principled legal reasoning that may obtain in all cases, than the result in a particular case, recognize that the danger in Katzenbach is that it authorizes congressional usurpation of the power of judicial review vested by our Constitution in the courts -- a usurpation that can be used to further conservative, as well as liberal, ends. Indeed, this criticism of Judge Bork's attempt to preserve constitutional adjudication in the courts is most curious, for it directly contradicts the standard anti-Bork

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[90] R. Bork, The Constitutionality of the President's Busing Proposals, (AEI) 8 (1972).

refrain that he is too deferential to legislative authority. As this illustrates, there are those who invoke an independent judiciary only when it produces a result to their liking.

In contrast, Judge Bork has consistently opposed congressional usurpation regardless of whether the goal is to ban literacy tests or legislatively overrule Roe v. Wade. Accordingly, if Judge Bork's opposition to Morgan means that he is "against civil rights," it must also mean that he is "pro-abortion." Of course, it means neither, but merely reflects his opposition to congressional efforts to amend the constitution through legislation. This is what is known as principled decisionmaking.

3. State Action

The Biden report accuses Judge Bork of opposing civil rights advances because as a law professor he criticized Reitman v. Mulkey, 387 U.S. 369 (1967) in 1968[91] and Shelley v. Kraemer, 334 U.S. 1 (1948) in 1971.[92] The report fails to note that neither case involved civil rights per se, but only the question of whether and under what circumstances the fourteenth amendment or other constitutional restrictions on state action reached purely private conduct. Nor does the report note that the clear weight of modern legal authority on these cases is that both of them, however beneficial their short-term results, cannot be squared with the bulk of Supreme Court "state action" jurisprudence. As Harvard Professor Laurence Tribe has explained:

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[91] "The Supreme Court Needs a New Philosophy," Fortune at 166, Dec. 1968.

[92] Neutral Principles, at 15-17.

> To contemporary commentators . . . Shelley and Reitman appear as highly controversial decisions. In neither case, the critical consensus has it, is the Court's finding of state action supported by any reasoning which would suggest that the 'state action' is a meaningful requirement rather than an empty formality. Of course, as several recent Supreme Court decisions indicate, the state action requirement is plainly not an "empty formality."

L. Tribe, American Constitutional Law at 1156-57 (1978).[93] The Biden report notes in its introduction that it was read and approved by Professor Tribe, yet it failed to inform the public on the current status of "mainstream" legal thinking on these cases. Of course, this entire issue is, in all events, purely academic since the Fair Housing Act of 1968 and section 1981 now prohibit private racially discriminatory housing practices and contracts.

The fourteenth amendment enjoins states, not private citizens, from violating the civil rights of individuals. The Supreme Court has long recognized and continuously affirmed "the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield."[94] This makes the basic point so readily obscured by Judge Bork's crit-

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[93] Professors Wechsler and Henkin, both of Columbia, have noted the lack of a neutral principle behind Shelley. See Wechsler, Toward Neutral Principles on Constitutional Law, 73 Harv. L. Rev. 1, 29 (1959); Henkin, Shelley v. Kraemer, Notes For A Revised Opinion, 110 U. Penn. L. Rev. 473, 474 (1962).

[94] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (quoting Shelley v. Kraemer, 334 U.S. 1 (1948)).

ics. No judge condones private conduct, "however discriminatory and wrongful," by concluding that the behavior challenged in a particular case does not involve action by the state and hence does not violate the Constitution. Instead, the judge respects the limits on the coercive force of the fourteenth amendment.

The issue of constitutional interpretation thus focuses solely on the determinants of state action. In Shelley, where the Court had just begun to grapple with the complexities of the state action doctrine, petitioners challenged the racially restrictive covenants adopted by private parties barring the sale or use of homes by non-whites. The Court unanimously recognized that such provisions, however wrong, presented no constitutional infringement.[95] The Court did conclude, however, that the covenants violated the fourteenth amendment because the parties went to state court to enforce the covenants. Thus, as Justice Powell later critically noted in a somewhat different case, the Court held that "a private citizen who did no more than commence a legal action of a kind traditionally initiated by private parties, thereby engaged in 'state action.'" Lugar v. Edmondson Oil Co., 457 U.S. 922, 945 (1982) (Powell, J., dissenting).

It was on this point, and this point alone, that Judge Bork criticized the Court's failure to state a principle capable of uniform application. If applied beyond its facts, Bork argued,

[95] Shelley v. Kraemer, 334 U.S. at 13 ("We conclude[d], therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been

Shelley would convert most forms of private conduct into "state action" subject to invalidation by courts as "unconstitutional." For example, under this theory, if one asks a guest to leave one's house for being rude and insulting, and the guest refuses to do so, one could not call the police and enforce the trespass laws because once the police came, that would be "state action" and the state would be violating the guest's first amendment right of free speech. Echoing Professor Herbert Wechsler's earlier criticism, Judge Bork concluded that the decision was not neutral because, "the Court was most clearly not prepared to apply the principle to cases it could not honestly distinguish."[96] Judge Bork's criticism is not only well reasoned; it has proved to be prophetic.

The Supreme Court has repeatedly refused to extend Shelley. For example, in Evans v. Abney, 396 U.S. 435 (1970), the petitioners argued that land conveyed to the city in trust for the sole use of whites did not properly revert to the heirs of the donor when the trust failed. The Evans court ruled 5-2 that, even though the state court enforced this racially discriminatory trust, this did not constitute state discrimination under the fourteenth amendment. Justice Black's opinion for the Court concluded that "any harshness that may have resulted from the state court's decision can be attributed solely to its intention to effectuate as nearly as possible the explicit terms of [the donor's] will." Id. at 444. Justice Brennan's argument that

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95 (Cont.) violated.")

96 Neutral Principles, at 15.

Shelley applied was not accepted.[97]

Two years later, in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), Irvis charged that Moose Lodge, a local branch of a national fraternal organization, violated his constitutional rights by refusing him service solely because he was black. In a 6-3 opinion by Justice Rehnquist, joined by Justice Powell, the Court again found no state action. The club was privately owned; it was not open to the public; and the liquor license awarded by the state did not "in any way foster or encourage racial discrimination." Id. at 176-77. The Court restricted the relief to a decree enjoining enforcement of state regulations insofar as they required compliance with racially discriminatory provisions adopted by Moose Lodge. Respondent, said the Court, "was entitled to no more." Id. at 179.

Of course, it would be grotesquely unfair to suggest that Justices Black or Powell, or any of the other justices who formed the majority in Evan or Moose Lodge somehow concluded or tolerated racially discriminatory trusts or clubs. Like Judge Bork, these Justices simply sought to preserve, in a principled manner, the constitutionally-mandated distinction between state and private action, even in circumstances where the private action is deplorable. Yet this is the level of attack on Judge Bork.

Justice Powell joined in the opinion in Moose Lodge, as he has in every other major opinion limiting the scope of state

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[97] 396 U.S. at 445 (distinguishing Shelley).

action.[98] The rule articulated in Moose Lodge has been repeatedly affirmed by the Court in subsequent cases.[99] The current analysis was succinctly expressed by Justice Powell in his recent opinion in San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 55 U.S.L.W. 5061 (June 25, 1987). The lesson of these cases is that, "[the government] can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." Id. at 5067. This standard, of course, cannot be reconciled with Shelley. In Shelley, the private citizens had made the decision to discriminate, in housing, without any state coercion or encouragement. Since the only state involvement was providing a forum for enforcement, the decision to discriminate clearly could not be "deemed to be that of the government."

Further, it is particularly ironic that Judge Bork is attacked for his views on Shelley, since he filed an amicus brief as Solicitor General to persuade the Court in Runyon v. McCrary, 427 U.S. 160 (1976) that section 1981 reaches private discriminatory contracts. In conjunction with the 1968 Fair Housing Act's prohibition on private action, these legislative enactments foreclose any further use of racially restrictive covenants. Thus, even the result in Shelley is of no present import.

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[98] E.g., Lugar v. Edmonson Oil Co., 457 U.S. 922, 945 (1982) (Powell, J., dissenting).

[99] Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

Similar points may be made concerning Judge Bork's criticism of Reitman v. Mulkey, 387 U.S. 369 (1967). Five justices ruled in Reitman that a provision of the California Constitution, guaranteeing the right of the private individual to sell or lease his residential property to whomever he chose, violated the fourteenth amendment because it implicitly encouraged private discrimination. Justice Harlan, joined by Justices Black, Clark and Stewart wrote a strong dissent. He emphasized that the fourteenth amendment "does not undertake to control purely personal prejudices and predilections, and individuals acting on their own are left free to discriminate on racial grounds if they are so minded." Id. at 388 quoting Civil Rights Cases, 109 U.S. 3. State action was involved in the passage of section 26, but Justice Harlan denied that this resulted in any infringement of equal protection: "by its terms [section 26 is] inoffensive, and its provisions require no affirmative governmental enforcement of any sort." Id. at 392. Nor, in Harlan's view, did it encourage private discrimination; the state declared its neutrality. Effectively, Justice Harlan pointed out, the Court was saying that state antidiscrimination laws are unrepealable, since the repeal of such a law would encourage discrimination, and, under the majority's reasoning, violate the fourteenth amendment. He concluded that the majority "has taken to itself powers and responsibilities left elsewhere by the Constitution." Reitman, supra, 387 U.S. at 396.

This criticism is indistinguishable from that offered by Judge Bork. Judge Bork argued that passage of the housing provision "could be considered an instance of official hostility only if the federal Constitution forbade states to leave private persons free in the field of race relations. That startling conclusion can be neither fairly drawn from the fourteenth amendment nor stated in a principle capable of being uniformly applied."[100]

Justices Harlan, Black, Stewart and Clark have never been accused of being opponents of fair housing.[101]

4. Affirmative Action

The ACLU attacks Judge Bork for criticizing Justice Powell's Bakke opinion, which authorized racially preferential treatment in certain cases. The analysis of Judge Bork's views consists of one sentence: "Consistent with his narrow views on the Fourteenth Amendment, Judge Bork has also been a critic of the Supreme Court's affirmative action decisions, describing the Bakke opinion (in which Justice Powell cast the critical fifth vote) in the following terms: "As politics, the solution may seem statesmanlike, but as constitutional argument, it leaves you hungry an hour later." (ACLU, at 15) The Biden report adds

[100] R. Bork, "The Supreme Court Needs a Philosophy," Fortune, Dec. 1968, at 166.

[101] It is also worth noting that in Crawford v. Board of Education, 458 U.S. 527 (1982), Justice Powell, in an 8-1 opinion (Justices Blackman and Brennan concurring) distinguished and does not follow Reitman, despite the similarity of the legal issues, twice quoting, with approval Justice Harlan's Reitman dissent. In Crawford, Justice Powell upheld an amendment to the California Constitution prohibiting a state court from ordering school busing except to conform to requirements under the federal Con-

only the conclusory assertion that "Judge Bork would give little or no weight to past patterns of racial discrimination and exclusion as a basis for affirmative action." (Biden Report, at 46)

Judge Bork's critics seem to believe that any criticism of any aspect of the Bakke decision demonstrates insensitivity to "civil rights." In the first place, the sum total of Bork's criticism of Bakke consists of a Wall Street Journal editorial written in 1978 and, that same year, a short four-page policy assessment of admission quotas for graduate and professional schools.[102] Judge Bork has never since published his views on the subsequent Supreme Court affirmative action decisions or ruled in an affirmative action case. Moreover, Judge Bork's criticism of the Bakke opinion was a thoughtful analysis which tightly focused on Justice Powell's legal reasoning without reaching the broader questions involved in this issue.

In any event, assuming that Judge Bork indeed believes the Constitution embodies an inviolate prohibition against racial discrimination, that belief hardly constitutes a "narrow view" of the Fourteenth Amendment or reflects a lack of devotion to civil rights. To the contrary, it reflects an expansive view of the Fourteenth Amendment as protecting all persons, minority and nonminority, against discrimination on the basis of unsuitable and irrelevant characteristics such as race or ethnicity. This

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101 (Cont.) situation.

102 Bork, The Unpersuasive Bakke Decision, The Wall Street Journal, at 8, col. 4 (July 21, 1978); Bork, A Murky Future, AEI J. Gov't. and Society 36 (Sept./Oct. 1978).

criticism is particularly puzzling given the (false) accusation elsewhere that Judge Bork fails to include a sufficient number of individuals within the ambit of the Fourteenth Amendment protection. Perhaps Judge Bork has selected the wrong persons for inclusion. While some may disagree with the proposition that government should treat all its citizens without regard to race, the notion hardly originated with Judge Bork and does not distinguish him from acknowledged champions of civil rights.

For example, Justice Douglas eloquently explained why the Constitution prohibits racially preferential treatment in higher education: "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."[103] Thus, concluded Douglas, "[s]o far as race is concerned, any state-sponsored preference of one race over another in [the competition among races at all professional levels] is in my view 'invidious' and violative of the Equal Protection Clause."[104]

Two years after Bakke, Justice Stewart restated this fundamental proposition in dissent in Fullilove v. Klutnick, 448 U.S. 448 (1980):

> [U]nder our Constitution, the government may never act to the detriment of a person solely because of the person's race. . . . The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority. . . . [Government action] that imposes burdens on the basis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination.

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103 Defunis v. Odegaard, 416 U.S. 312, 342 (1974) (Douglas, J., dissenting).

104 Id. at 343-44.

Id. at 525.

Justice Stevens, dissenting in the same case, underscored the "pernicious" effect of racial classification schemes:

> Racial classicifications are simply too pernicious to permit any but the most exact connection between justification and classification. . . . For if there is no duty to attempt either to measure the recovery by the wrong, to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members."

Id. at 537-39.

Indeed, the Bakke decision itself struck down an admissions quota to medical school. As explained by Philip Kurland, who filed an amicus brief challenging the quota, "On the major issue -- whether mere membership in a so-called racial or ethnic minority constitutionaly justified a privilege or preference by a state or federal governmental agency -- there was a clear majority of five in opposition." Much of what Bakke "stands for" in the minds of Judge Bork's critics was in fact criticized by the Supreme Court itself.

As Justice Stevens concluded for four justices, in Bakke, [U]nder Title VI it is 'not permissible to say 'yes' to one person, but to say 'no' to another, only because of the color of the skin." Among the many scholars to echo Bork's views, then-Professor Scalia criticized Justice Powell's position that the goal of diversity in medical school could justify official racism:

> If that is all it takes to overcome the presumption against discriminatioon by race, we have witnessed an historic trivialization of the Consti-

> tution. Justice Powell's opinion . . . is thoroughly unconvincing as an honest, hardminded, reasoned analysis of an important provision of the Constitution. . . . [T]he racist concept of restorative justice . . . is fundamentally contrary to the principles that govern, and should govern, our society.

Scalia, The Disease as Cure: "In order to get beyond racism, we must first take account of race," 1979 Wash. U. L.Q. 147. Justice Scalia concluded his article with the trenchant observation that, "[f]rom racist principles flow racist results."

As Alexander Bickel put it in his seminal work, The Morality of Consent 133 (1975), "The history of the racial quota is a history of subjugation, not beneficence . . . . [T]he quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desparately striving for an equality that will make race irrelevant." Perhaps Professors Bickel and Kurland put it best in their amicus brief in the Bakke case:

> A racial quota cannot be benign. It must always be malignant, malignant because it defies the constitutional pronouncement of equal protection of the laws; malignant because it reduces individuals to a single attribute, skin color, and is the very antithesis of equal opportunity; malignant because it is destructive of the democratic society which requires that in the eyes of the law every person shall count as one, none for more, none for less.[105]

It was ringing language then. It is ringing language now. Most important, it reveals that any claim that Judge Bork is opposed to "civil rights" means only that he supports equal opportunity for all. This should not be a disability in a nation dedicated to the primacy of the individual and equality under law.

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[105] Brief for Anti-Defamation League, Regents of the University of California v. Bakke at 19.

5. Sex Discrimination

As noted above, Judge Bork has joined or authored a number of opinions enforcing the rights of women to be free from discrimination in the workplace.[106] Despite these decisions, and the fact that in all but one civil rights case Judge Bork has sided with a minority or female plaintiff raising a substantive legal claim of race or gender discrimination, it has been said that "his appointment to the highest court in the land [is] a particular threat to women." This is not mere overstatement, but blatant falsehood, based on a failure, or unwillingness, to understand Judge Bork's views on equal protection and his opinions in two cases, Vinson v. Taylor, 753 F.2d 141, rehearing en banc denied, 760 F.2d 1330 (D.C.Cir 1985), aff'd in part and remanded sub. nom. Meritor Savings Bank v. Vinson, 106 S.Ct 2399 (1986), and Oil, Chemical and Atomic Workers Union v. American Cyanamid, 741 F.2d 444 (D.C. Cir. 1984). We first explain Judge Bork's dissent from denial of rehearing en banc in Vinson v. Taylor, to make clear that Judge Bork's views on the issue of sexual harassment are neither "extreme" nor would they, as the Women's Center suggests, preclude "meaningful protection from such harassment." (at 25)

(1) Vinson v. Taylor

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[106] Judge Bork has also joined or authored opinions that establish, for example, that the State Department's Foreign Service was subject to the Equal Pay Act, that female stewardesses may not be paid less than male pursers in jobs that are nominally different, and that inferences of discrimination can be made based solely on statistical evidence.

At the outset, it must be made clear that the Supreme Court did in fact agree with Judge Bork's opinion in Vinson. In possibly the most outlandish assertion in all the reports, the Biden report accuses the "White House Position Paper" on Judge Bork of "distorting the facts" when the White House said that the Supreme Court "adopted positions similar to those of Judge Bork both on the evidentiary issues and on the issue of liability" in the Vinson case. We will present the relevant excerpts from both opinions and let the readers decide for themselves who is distorting the facts.

On the evidentiary issue presented in Vinson, Judge Bork believed that the panel was wrong in holding that "a supervisor must not be allowed to introduce . . . evidence of an employee's dress or behavior in an effort to prove that any sexual advances were solicited or welcomed." 760 F.2d at 1331. The Supreme Court said that the panel was wrong in excluding this evidence because "it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome." 106 S. Ct. at 2407.

On the liability issue in Vinson, Judge Bork disagreed with the panel's imposition of automatic liability on an employer for an employee's harassment, noting that "we ought to take up the difficult and important question of the employer's vicarious liability under Title VII for conduct he knows nothing of and has

done all he reasonably can to prevent." 760 F.2d at 1331.[107] On the liability issue, the Supreme Court stated "we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by the supervisors."

In an effort to suggest that Judge Bork and the Supreme Court do not have "similar positions" on these issues, both Senator Biden's report and the Women's Center play misleading semantic games with the word "voluntary". The Women's Center[108] contends "that Judge Bork argued that 'voluntariness' -- an employee's capitulation -- is a complete defense to a crime of harassment." (at 27) Similarly, the Biden report states "Judge Bork's holding on the voluntariness issue was flatly rejected by a unanimous Supreme Court." (at 15)

However, when Judge Bork's words are not lifted entirely out of their context, it is quite clear that he and the Supreme Court are in agreement on this issue. Indeed it is insulting to even suggest that Judge Bork in any way hinted that "sexual harassment" has not occurred so long as the female subordinate "voluntarily" consents to her supervisor's intimidation, and has not actually been "involuntarily" harassed by him.

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[107] Judge Bork indicated that some guidance could be derived from "traditional principles of respondeat superior," the agency principles governing employment relationships. The court also concluded "that Congress wanted courts to look to agency principles for guidance in this area." 106 S.Ct. at 2408.

[108] Nowhere does Judge Bork use the words "capitulate" or "succumb" as does the Women's Center. (at 26, 27) In fact, once the Women's Center introduces the word "capitulate," it cleverly uses it throughout the rest of its discussion, using it to replace "voluntary". (at 27)

As noted, the entire question in this regard was whether the supervisor would be permitted to defend himself by proving that the alleged sexual advances were not grudgingly acquiesced in by the female subordinate, but were actually solicited and freely accepted for reasons wholly unrelated to his superior employment status - i.e., that they were "voluntarily" accepted. On this point the District Court had found that the "relationship was a voluntary one by [Vinson] having nothing to do with her continued employment at Capital or her advancement or promotion at that institution." The appellate panel held that it was entirely irrelevant that the sexual relationship was wholly unrelated to the employment situation, and evidence relating to Ms. Vinson's alleged solicitation was therefore excluded.

Judge Bork made the obvious point that Title VII does not outlaw all normal office romances. Accordingly, the court must be able to distinguish whether a sexual relationship between co-employees is a genuine romantic office relationship or an exploitive, unwelcome situation. This is precisely and only what Judge Bork argued and that is what the Supreme Court decided.

> [T]he panel . . . holds that a supervisor must not be allowed to introduce similar evidence also of an employee's dress or behavior in an effort to prove that any advances were solicited or welcomed. . . . While hardly determinative, this evidence is relevant to the question of whether any sexual advances by her supervisor were solicited or voluntarily engaged in. Obviously, such evidence must be evaluated critically and in light of all the other evidence in a case, but it is astonishing that it should be inadmissible.

760 F.2d at 1331 (emphasis added).

The Supreme Court agreed with Judge Bork on this issue and held that such evidence must be admitted. It said:

> Specifically, the Court of Appeals stated that testimony about [Vinson's] "dress and personal fantasies," which the District Court apparently admitted into evidence "had no place in this litigation." The apparent ground for this conclusion was that respondent's voluntariness vel non in submitting to Taylor's advances was immaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found the advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and the totality of circumstances, such as the nature and context in which the alleged incidents occurred."

106 S. Ct. at 2407 (citations omitted and emphasis added).

Thus, when placed in context, it is clear that Judge Bork did not mean "voluntariness" in the sense of capitulation by an employee, under duress, in fear of losing her job. He consistently discussed "voluntariness" in the context of "solicitation" by the employee. Like the Supreme Court, he focused on whether the advance was "welcome" or not, using the words "welcomed," "unwanting," and "unwelcomed." 760 F.2d at 1331 & 1333 n.7. It is obvious that what he meant by "voluntary," and what the Supreme Court clearly defined as "voluntary", is that an employer must have the opportunity to introduce evidence to show that the sexual advances were not "unwelcome."[109]

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[109] Mysteriously, the Biden report says "Judge Bork's holding on the voluntariness issue was flatly rejected by a unanimous Supreme Court, with Justice Powell joining the opinion. (The Court did agree with Judge Bork on the evidentiary issue.)" (at 15) This is mysterious because Judge Bork's argument (not "holding") about "voluntariness" was on the evidentiary issue, and was, as the Biden report correctly states, adopted by the Supreme Court. The Feminist Men's Alliance does not even

The Women's Center and the Biden report next charge that Judge Bork "questioned whether sexual harassment should be prohibited discrimination at all." (Women's Center, at 25) In Vinson, the employer's primary argument was that Title VII was violated only if the harassment denied the women a tangible job benefit; a "hostile environment" was insufficient. The panel opinion rejected that argument and accepted a hostile environment theory. Judge Bork evinced no disagreement with the panel opinion on this, the most fundamental issue in the case, and did not suggest that the case should be reheard to consider this question.

Nevertheless, the Women's Center focuses on one footnote in the opinion, to suggest that Judge Bork would foreclose all sexual harassment suits.[110] In that footnote, Judge Bork stated "perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as 'discrimination." 760 F.2d at 1333 n.7. Judge Bork's only point here was that "sexual harassment" suits do not fit neatly into any traditional theories of Title VII discrimination and thus require a distinct conceptual analysis in terms of both liability and remedy.[111] As Judge Bork stated, that "if it is proper to

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109 (Cont.) acknowledge the evidentiary point.

110 Judge Bork included this footnote in a dissent from a denial of rehearing en banc, not a determination on the merits. Such a statement is in fact a plea to have the opportunity to review the record and make a full, fair determination on the merits.

111 Imposing strict liability on an employer may make sense in the context of an employee denied employment or advancement, for only the employer can provide an adequate remedy for the employee. But strict liability does not always make sense in "hostile environment" cases, because if an employer has already

classify harassment as discrimination for Title VII purposes, that decision at least demands adjustments in subsidiary doctrines." 760 F.2d at 1333 n.7. This hardly suggests any desire for wholesale exclusion of "sexual harassment" claims, particularly in light of his acceptance of the panel's decision to allow such suits. Rather, Judge Bork was simply flagging the unique conceptual difficulties posed by harassment cases.

His point is well-taken, as the situation confronting the D.C. Circuit in King v. Palmer, 778 F.2d 878 (D.C. Cir. 1986) proved. In that case a supervisor, Dr. Smith, had an affair with one of his employees, Ms. Grant. Though Ms. Grant was a much inferior employee, she was favored with a promotion over Ms. King, who reported to Dr. Smith as well. Ms. King sued under Title VII, which bars discrimination on the basis of sex. Plainly, what Dr. Smith did was reprehensible, but the question remains: did he discriminate on the basis of gender? Both Ms. Grant and Ms. King were women. Did Dr. Smith discriminate against Ms. Grant? She never said so, and seems from the case to have been as romantically involved as Dr. Smith in the relationship. If she was so victimized, should she be denied the promotion she achieved through the relationship? Was Ms. King discriminated against? Certainly, but was it on the basis of her gender? If Smith never sexually approached King -- as must be assumed, for she made no such claim -- what is her complaint other than that she has been discriminated against on the basis

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111 (Cont.) done all that can be done to discourage sexual harassment, an injunction -- the only remedy available for such a claim -- is useless.

of that relationship? To be sure, promotions should not be based on such considerations. And if Ms. King's objection is to Grant's relationship with Dr. Smith, what difference does it make to King that Grant and Smith are having an affair? Would Title VII give Ms. King a cause of action for discrimination based on sexual harassment if Smith and Grant only had dinner together? What if they went to the same church, country club or played bridge together, and Dr. Smith promoted Ms. Grant because of that? In each case, the reason for denying King the promotion she deserves is illegitimate and wrong, but did Congress really intend for Title VII to be a blanket anti-cronyism rule?

We set forth the above discussion at length only to illustrate the difficulties in borrowing concepts directly from the normal Title VII context to use in the harassment context and to demonstrate that Judge Bork's view here is neither extreme nor illogical.[112] As Judge Skelly Wright noted in Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), normal Title VII rules do not "fit with precision the very unusual, perhaps unique, situation of sexual harassment where the alleged basis of the discrimination is not the employee's gender per se, but her refusal to submit to advances that she suffered in large part because of her gender." 641 F.2d at 951 (emphasis added).

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[112] To illustrate this doctrinal problem, Judge Bork noted that it seems somewhat "bizarre" that current sexual harassment case law contains an exemption for bisexual supervisors. Judge Bork did not originate this example. In fact, Judge Skelly Wright first used this hypothetical in his opinion in Barnes v. Costle, 561 F.2d 983, 990 n. 5 (D.C.Cir. 1977), and it was discussed by another panel of the D.C. Circuit as well. Bundy v. Jackson, 641 F.2d at 942 n. 7. Judge Bork sat on neither of those panels.

To be sure, these conceptual problems would not arise if all sexual relationships between supervisor and employee were per se illegal, as is racial discrimination, but it has yet to be argued that Title VII intended to outlaw all such office romances. Presumably, it is for this reason that Judge Ruth Bader Ginsburg, a former law professor who specialized in employment discrimination law and who was appointed by President Carter, joined Judge Bork's "separate statement" in King v. Palmer, 778 F.2d 878, 883 (D.C. Cir. 1985) (denial of rehearing en banc), which the Women's Center presents as further evidence of his antagonism to women's rights. It should also be noted that Judge Scalia joined Judge Bork's dissent from the denial of rehearing en banc. That these two distinguished jurists joined Judge Bork in these opinions demonstrates beyond cavil the reasonableness of his approach.

In short, Judge Bork's opinion in Vinson, assuming as it does that Title VII covers sexual harassment, makes plain that Judge Bork would protect a woman if she were subjected to "sexually stereotyped insults" or "demeaning propositions" that illegally poison the "psychological and environmental work environment." 753 F.2d at 145, quoting Bundy v. Jackson, 641 F.2d 934,946 (D.C. Cir. 1981). The Womens' Center's failure to consider carefully Judge Bork's thoughtful opinions on sexual harassment and its rush to characterize him as an "extremist" demonstrate its bias, a bias derived from a desire to have only judges who will act to ban that which it wishes them to ban, whether or not those judges have a basis in law for their determination.

Public Citizen makes another selective exception to its "methodology" of analyzing only non-unanimous decisions in order to attack Judge Bork's opinion in Oil, Chemical and Atomic Workers International Union v. American Cynamid Co., 741 F.2d 444 (D.C. Cir. 1984). The facts of the case, which involved sterilization of fertile female employees, make it easy to sensationalize. But Judge Bork's opinion, which then-Judge Scalia and Senior District Judge Williams joined, is anything but an endorsement of sterilizing workers.

The Occupational Safety and Health Administration ("OSHA") requires employers to guard against harm to fetuses on the ground that harm to fetuses is "a material impairment of the reproductive systems of the parents," and the D.C. Circuit has called this position "unassailable." United Steelworkers of America v. Marshall, 647 F.2d 1189, 1256 n.96 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981). OSHA's lead standard specifies lead levels that will avoid severe danger to fetuses. In American Cyanamid, an employer concluded that it was impracticable to reduce airborne lead levels in the Inorganic Pigments Department at one of its plants to a level that would be safe for fetuses. Accordingly, the employer adopted a policy that women of childbearing age could not continue to work in the department unless they were sterilized. American Cyanamid, 741 F.2d at 446.

OSHA issued the employer a citation for violating the Occupational Safety and Health Act, reasoning that the employer's policy was a "recognized hazard" that could "cause death or serious physical harm . . . ." The Occupational Safety and

Health Review Commission ("OSHRC"), which adjudicates cases brought by OSHA, ruled in favor of the employer, on the ground that "Congress conceived of occupational hazards in terms of processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work related activities." American Cyanamid, 741 F.2d at 447.

Judge Bork affirmed OSHRC's decision.[113] Although he agreed that "the words of the general duty clause can be read, albeit with some semantic distortion, to cover the sterilization exception contained in American Cyanamid's fetus protection policy," he rejected the union's argument that the words of the statute were "so plain that they foreclose all interpretation." American Cyanamid, 741 F.2d at 447-448 (emphasis added). After examining analogous case law interpreting similar language, and legislative history indicating that Congress's concern was with pollutants, poisons, unsafe work practices and the like, he concluded that "the general duty clause does not apply to a policy as contrasted with a physical condition of the workplace." Id. at 449. However, he noted that the sterilization policy "may be an 'unfair labor practice' under the National Labor Relations Act or a forbidden sex discrimination under Title VII of the

[113] The Secretary of Labor did not file a brief opposing OSHRC's decision in the D.C. Circuit. Rather, the employees' union, which had intervened in the administrative proceedings, took an appeal to that court. It is therefore impossible to understand Public Citizen's criticism of Judge Bork for giving "no deference to the judgment of the Secretary of Labor." (Public Citizen, at 39) The federal courts of appeals are divided on the question of whether the Secretary or OSHRC is entitled to deference when their interpretations of the Act or of a regulation conflict, see Donovan v. A. Amorello & Sons, Inc., 761 F.2d 61, 64-66 (1st Cir. 1985), but such a conflict was not presented here because the

Civil Rights Act of 1964." Id. at 450 n. 1. In fact, the union and the women employees had filed suit against the employer under Title VII and reached a settlement with the employer. Ibid.

Public Citizen's principal criticism of this careful opinion is that Judge Bork "strongly implied" over the plaintiff's objection that "the company could do nothing to reduce the hazard posed by the lead," and that its "drastic sterilization policy was the only 'realistic and clearly lawful' measure it could employ to avoid harming the fetuses." (Public Citizen, at 38) Judge Bork did rely on an administrative law judge's finding, in a related proceeding, that it was economically infeasible for the employer to reduce air lead levels at the department to a level that would, according to OSHA predictions, still have been far too high for fetal safety. American Cyanamid, 741 F.2d at 446. He also relied on the D.C. Circuit's holding in Steelworkers, 647 F.2d at 1295, that OSHA had failed to show that it was technologically feasible to reduce air lead levels in the pigment manufacturing industry to the level that OSHA proposed to require -- a level that would still have posed a threat to fetal safety. But there is nothing unusual or improper about taking judicial notice of these relevant rulings and findings.[114]

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[114] Indeed, although Public Citizen ignores the point, Judge Bork went out of his way to narrow the employer's victory on the basis of this background: "The case might be different if American Cyanamid had offered the choice of sterilization in an attempt to pass on to its employees the cost of maintaining a circumambient lead concentration higher than that permitted by law." American Cyanamid, 741 F.2d at 450.

Public Citizen also mischaracterizes Judge Bork's opinion, which it describes as holding that "an employer may require its female workers to be sterilized in order to reduce employer liability for harm to the potential children." (Public Citizen at 39.) In fact, the employer "had to prevent exposure to lead of women of childbearing age, and, furthermore, . . . the company could not have been charged under the Act if it had accomplished that by discharging the women or by simply closing the Department, thus putting all employees who worked there, including women of childbearing age, out of work." American Cyanamid, at 449. Thus, the truth of the matter is that "[t]he company was charged only because it offered the women a choice." Id. at 449. Indeed, the union conceded that the company could have "simply stated that 'only sterile women' would be employed in the Department because then there would have been no 'requirement' of sterilization." Id. at 450. Although Judge Bork sympathized in that the women were presented with a "most unhappy choice", he rightly concluded that such a policy would simply have given the women the same choice but less information about it. Id. at 450.

(2.) Equal Protection

Perhaps the most fundamentally misunderstood of all of Judge Bork's views are his views on the applicability of the equal protection clause to women and members of other non-racial groups. The Supreme Court has adopted a three-tier approach to equal protection analysis. Suspect classifications, such as race, ethnicity, and sometimes alienage, receive strict scrutiny; classifications based on sex and illegitimacy receive intermedi-

ate scrutiny, and all other classifications receive rational basis review. Upon examination, however, it is plain that Judge Bork's approach is quite similar to that of Justice John Paul Stevens and would not lead to results appreciably different from current Supreme Court precedent. Indeed, his approach would lend an added measure of coherence to the Court's equal protection analysis.

The most ardent defender of the "tier" approach is Professor John Hart Ely, who states that "'discrete and insular' minorities are entitled to special constitutional protection from the political process."[115] As Judge Bork pointed out, Ely would have courts "lift the disabilities imposed by legislation upon aliens, illegitimates, homosexuals, perhaps the poor, [and] to some degree women."[116] But the equal protection clause was not a judicial warrant to intervene in the legislative process to ensure political parity for all cognizable groups in society -- from small businesses to labor unions.

First, choosing among particular groups to determine which are sufficiently "discrete" and "insular" to warrant judicial solicitude is inherently an ad hoc and subjective process without any support in the language or history of the equal protection clause. Since any group that loses out in the legislative processes is at least, in that sense, a "minority," Ely's approach "channels judicial discretion not at all and is subject to abuse

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115 J. Ely, Democracy and Distrust 148 (1980).

116 Catholic University Speech, March 31, 1982.

by a judge of any political persuasion."[117] For these reasons, the Court in recent years has moved away from this form of analysis, denying heightened scrutiny to the elderly and mentally retarded, although both groups are at least arguably discrete and insular minorities. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); City of Cleburne, Texas v. Cleburne Living Center, 105 S. Ct. 3249 (1985).

Indeed, a contrary view would logically mean that any legislative classification disadvantaging convicted felons would be subject to strict scrutiny, since felons are certainly a discrete and insular minority without any political power. Nevertheless, no one would believe that a legislative distinction between felons and others, such as whether or not to imprison felons, should be viewed as "suspect" by a court. This illustrates Judge Bork's basic point: the equal protection clause does not protect "politically disadvantaged" groups, it prohibits applying certain kinds of unfair legislative classifications to all persons.

Racial classifications are the paradigmatic example of such invidious discrimination and, as the history of the fourteenth amendment demonstrates, are at the heart of the protection afforded by the Constitution. Consequently, classifications based on race or ethnicity are subject to the strictest judicial scrutiny and inevitably impermissible. See Brown v. Board of Education, 347 U.S. 483 (1954). In Judge Bork's view, all other classifications should be upheld so long as they are rationally

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117 Id.

related to a legitimate state interest. This emphatically does not mean that such classifications will invariably be upheld. The question in every case is whether the classification is a reasonable distinction based on a relevant trait or invidious discrimination based on false and outmoded stereotypes.

Justice John Paul Stevens' concurrence in City of Cleburne, 105 S.Ct. 3249, supra, parallels Judge Bork's approach. Justice Stevens has criticized the tier approach as merely a method the Supreme Court has "employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." Id. at 3261. According to Justice Stevens:

> [O]ur cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from "strict scrutiny" at one extreme to "rational basis" at the other. I have never been persuaded that these so called "standards" adequately explain the decisional process. Cases involving classifications based on alienage, gender, age or . . . mental retardation, do not fit well into sharply defined classifications.[118]

Moreover, a uniform approach to equal protection analysis provides a more coherent explanation for the Court's decisions. For instance, a legislative distinction between optometrists and opticians is rationally related to the state's interest in the health of its citizens. See Williamson v. Lee Optical Co., 348 U.S. 483 (1955). But a zoning restriction directed against homes for the mentally retarded is not. See City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3260 (1985). Under a uniform approach, the question in every case is whether the trait underlying the classification is properly taken into account.

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[118] City of Cleburne, 105 S. Ct. at 3260-61 (footnote omitted).

Because race "bears no relation to the individual's ability to participate in and contribute to society," Mathews v. Lucas, 427 U.S. 495, 505 (1976), it is by definition not a rational basis for classification. Thus, any classification based on shopworn prejudices is inherently irrational.

Other traits, however, such as sex, alienage, or illegitimacy may sometimes be rationally related to a legitimate state interest. For example, the meaning of citizenship is membership in the political community. Thus, some distinctions between citizens and resident aliens are inevitable. And prohibitions on, say, voting by aliens are unquestionably rationally related to the trait of non-citizenship. Alienage restrictions relating solely to economic interests, however, do not bear a rational relationship to one's status as an alien. For this reason, although the Supreme Court generally applies strict scrutiny to state alienage classifications, see Graham v. Richardson, 403 U.S. 365 (1971) (invalidating state denial of welfare benefits to aliens), it applies only rational basis analysis if the classifications "preserve the basic conception of a political community" Dunn v. Blumstein, 405 U.S. 330, 344 (1972). See Ambach v. Norwick, 441 U.S. 68 (1979) (upholding citizenship requirement to be a public school teacher). But surely it is more coherent and straightforward simply to ask whether the classification is rational because it relates to preserving the political community or irrational because it does not. Creating and applying differing levels of scrutiny is not necessary to decide these cases, and simply serves to obfuscate the analysis.

Justice Stevens, joined by Justice Rehnquist, made this very point in Cleburne:

> The rational basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause. It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply "strict scrutiny," or even "heightened scrutiny" to decide such cases.[119]

Thus, the question in every case is whether a classification reflects outmoded stereotypes and prejudices, or whether the trait underlying the classification reflects a rational difference among individuals. Thus, racially segregated combat units would constitute irrational discrimination because skin color has no bearing on one's ability as a soldier. Similarly, in Frontiero v. Richardson, 411 U.S. 677 (1973), the Supreme Court concluded that an Air Force regulation prohibiting women from claiming their spouses as dependents on the same basis as men was based on an irrational and outmoded stereotype. On the other hand, sex is sometimes, albeit rarely, relevant to one's ability to participate in certain activities. Thus, all-male combat units may well be rational because they may affect one's fighting ability. See Rokster v. Goldberg, 453 U.S. 57 (1981).

Judge Bork's approach leads to the same results as current Supreme Court doctrine except perhaps in a few unique cases or those invalidating laws that benefit women. For example, Judge Bork has stated:

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[119] 105 S.Ct. at 3261.

> When the Supreme Court decided that having different drinking ages for young men and young women violated the Equal Protection Clause, I thought that was . . . to trivialize the Constitution and to spread it to areas it did not address.[120]

In the case Judge Bork was describing, Craig v. Boren, 429 U.S. 190 (1976), the Court struck down a law establishing a 21-year old drinking age for men and an 18-year old age for women. As Bork notes, it is hard to imagine that the equal protection clause gives 18 to 21 year old men a constitutional right to drink simply because women were permitted to do so, and such rights do indeed seem trivial in comparison to the historic civil rights gains of minorities in this country.

Justice Powell has taken a similar position with regard to discrimination against men. In Mississippi University for Women v. Hogan, 458 U.S. 718 (1981), the Supreme Court held that a state nursing college for women unconstitutionally discriminates against men. Justice Powell dissented, insisting that the admissions policy "is one that discriminates against . . . no one." 458 U.S. at 743. "This simply is not a sex discrimination case. The Equal Protection Clause was never intended to be applied to this kind of case." Id. at 745 (footnote omitted). Justice Powell also characterized the Court's decision as anomalous in "applying a heightened equal protection standard, developed in cases of genuine sexual stereotyping to a narrowly utilized state classification that provides an additional choice for women." Id. at 736 (emphasis in original). Indeed, if literally

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120 World Net Dialogue (Panel Discussion) at 13, June 10, 1987.

applied, Ely's "protected groups" theory would mean that no classification characterizing men ever would be unconstitutional, since men are clearly not a discrete and insular minority. However, a substantial number of the most significant gender discrimination cases involved claims by men.

Justice Powell also seemed to echo Bork's views when warning the Court against adding "sex to the narrowly limited group of classifications which are inherently suspect." Frontiero v. Richardson, 411 U.S. 677, 692. According to Justice Powell:

> The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the State. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

Id.

This expresses the essence of Judge Bork's philosophy. Constitutional democracy envisions that limited resources generally will be the subject of public determination in the political arena. Every time some aspect of that domain of choice is constitutionalized with no basis in the text, history, or structure of that document, a corresponding portion of the debate about our common political life is unjustifiably withdrawn from the arena of democratic choice. That withdrawal has costs. As Judge Bork has said:

> Among our constitutional freedoms or rights, clearly given in the text, is the power to govern ourselves democratically. Every time a court creates a new constitutional right against government or expands, without warrant, an old one, the constitutional freedom of citizens to control their lives is diminished. . . . The claim of noninterpretivists, then, that they will expand rights and freedoms is false. They will merely redistribute them.

The Struggle Over the Role of the Court, National Review, Sept. 17, 1982, 1138-1139. Judge Bork's point is that judicial activism interferes with the constitutionally prescribed methods of making laws.

The only case Judge Bork has decided under the equal protection clause (aside from Dronenburg, 741 F.2d 1388 (D.C. Cir. 1984), a substantive due process case) affords no basis for the ferocious attacks launched by the Women's Center and others on his supposedly benighted view of that clause. In that case, Cosgrove v. Smith, 697 F.2d 1125 (D.C. Cir. 1983), Judge Bork dissented on one ground only: that male prisoners challenging the disparate treatment accorded them based upon their place of incarceration did not state meritorious statutory and equal protection claims. Judge Bork agreed with the majority that the court had jurisdiction to hear the appeal (thus granting access to litigants where the government sought to deny it) and that their ex post facto clause challenge was meaningless. More important, Judge Bork agreed that the record should be remanded to the district court to permit resolution of the prisoners' sex discrimination claim. Amazingly, Public Citizen tries to disparage even this. Judge Bork's agreement with the majority on this

issue is relegated to a footnote, and criticized for not "indicat[ing] whether a sex discrimination claim could prevail under the Constitution". (Public Citizen at 60 n.19) Of course, neither does the majority indicate whether a sex discrimination claim could prevail under the Constitution, for one simple reason: there was no need to state what was assumed.

Public Citizen's discussion of Cosgrove further demonstrates its misleading tactics. Cosgrove is described as "the only equal protection case that Judge Bork decided other than Dronenburg, discussed above, in which he summarily rejected the claim as being contrary to 'common sense and common experience' without demanding proof of any rationale for the discrimination. 741 F.2d at 1398". (Public Citizen, at 60-61) The reasonable reader will read this passage and assume that Judge Bork rejected the prisoners' equal protection claim in Cosgrove as being contrary to "common sense and common experience." In fact, that phrase is from Judge Bork's decision in Dronenburg; it nowhere appears in Cosgrove. Honesty requires that quotes not be taken out of context from one case to use them to explain another case and that short-form citation not be used where the previous citation to that case is five pages back.[121]

E. Administrative Law

1. General Regulation

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[121] Short Forms for Cases and Statutes, A Uniform System of Citation at 22-23 (Fourteenth ed. 1986) (1) Cases (i) "In the text and footnotes of briefs, legal memoranda, and similar materials, citations to a case that has already been cited in full in the same general discussion may be shortened to any of the . . . forms that clearly identifies the case . . . ." (emphasis added).

Public Citizen, the AFL-CIO, the Women's Center and the Students' comment all criticize Judge Bork's record in administrative law. They accuse Judge Bork of deciding cases lawlessly according to the identity of the litigants, and not by impartially analyzing the legal merits of claims brought before him. The various reports begin by stating, correctly, that Judge Bork is faithful to the teaching of the Supreme Court in Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), and the many other cases holding that judges must show substantial deference to decisions made by expert agencies. Obviously, the reports cannot attack Judge Bork for following Supreme Court precedent and showing deference to agencies. Instead, they accuse him of exercising that deference inconsistently.

According to the reports, Judge Bork applies judicial restraint inconsistently in a wide range of administrative law cases because he substitutes favoritism for neutrality. We are told that Judge Bork exercises judicial restraint rigorously whenever consumer, environmental or other "public interest" groups seek review of decisions made by government agencies. On the other hand, according to the reports, when businesses challenge agency decisions, Judge Bork ignores rules of judicial restraint, overturns agency decisions, and rules in favor of the business interest.

These reports, which purport to expose a pattern of favoritism underlying Judge Bork's opinions, are as irremediably flawed in substance as they are in methodology. The reports

consistently mischaracterize the interests at stake in the cases, trivialize the legal issues involved, and manipulate the holdings of the decisions, all in an effort to twist the meaning of the cases to cast Judge Bork's decisions in as unfavorable a light as possible.

Sound legal analysis is, in fact, the exception and not the rule in these superficial reports. While the reports are quick to characterize Judge Bork's voting record as "against the public interest," they offer little reasoned support for their conclusions or definition of their terms. Indeed, the full extent of the legal analysis in the AFL-CIO and student reports usually consists of nothing more than a one or two sentence summary of the result in each case, followed by a characterization of Judge Bork's vote as "for" or "against" the public interest. For example, the AFL-CIO's entire analysis of McIlwain v. Hayes, 690 F.2d 1041 (D.C. Cir. 1982), consists of the following sentence: "Bork rejects consumer challenge to 20-year delay in FDA issuance of rules regulating food additives." Thus, the AFL-CIO, as well as, Public Citizen, insinuate that Judge Bork intentionally flouted a law enacted by Congress because he wanted to allow manufacturers to expose the public to potentially dangerous food additives.

In reality, Judge Bork's majority opinion adhered faithfully to the explicit language of the statute enacted by Congress. The Food, Drug and Cosmetic Act requires manufacturers to show that color additives for food are safe before they can be sold. But Congress also created an exception to the Act that allowed addi-

tives to be sold for a "transitional" period while manufacturers tested their safety. Congress also gave the FDA discretion to extend the transitional period, consistent with public health and with continued testing.

The plaintiffs (including Public Citizen) argued that the FDA violated the law by extending the transitional period several times. The D.C. Circuit, with Judge Bork writing for the majority, upheld the agency because the statute set no limit on the number of extensions allowed. Curiously, Public Citizen now accuses Judge Bork of fixing on the "plain meaning" of the statute in order to evade congressional intent and vote against the public interest. In fact, the plain meaning of the language of a statute is the best evidence of congressional intent. Judge Bork merely applied this classic and accepted rule of statutory construction to a law regulating food additives. Congress, not Judge Bork, determined the outcome in McIlwain when it wrote the statute.

The various reports assert that Judge Bork sided against the public interest in Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 306 F.2d 1115 (1986). In fact, the majority opinion in TRAC, written by Judge Bork and joined by Justice Scalia, is a vote for the public interest and the First Amendment. The majority held that Congress did not codify the fairness doctrine, and that the Federal Communications Commission acted within its discretion in concluding that the public interest was best served by not subjecting a new broadcast technology, teletext, to fairness doc-

trine obligations. Judge Bork's skepticism about the fairness doctrine is shared by many scholars, including Justice Scalia, Judge David Bazelon, and others. Also noteworthy is the fact that although the losing party in TRAC petitioned the Supreme Court to review the case, the Court declined to do so. Still, Public Citizen insists on mischaracterizing TRAC as against the public interest, because broadcasters are "business interests." The report misleadingly describes the majority opinion not as a vote for the First Amendment, but as a vote "for" business and "against" the public interest.

The studies also misrepresent another communications case, Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (D.C. Cir. 1983). Public Citizen offers the most extreme caricature of Black Citizens, alleging that, as a result of the court's decisions, broadcasters need only "complete a postcard" to renew their licenses. The majority's decision is classified as "against" the public interest, but no fair reading of the case supports this meritless accusation.

The FCC's decision to make renewals more efficient in no way diminished a broadcaster's responsibility to serve the public interest. In the past, the FCC required broadcasters to file extensive paperwork with renewal applications. In time, the Commission discovered two relevant facts: most filings satisfied or exceeded operating guidelines, and in any event, public comments against a broadcaster's programming proved to be the best vehicle for bringing violations to the FCC's attention. The Commission responded logically by (i) simplifying renewal

procedures to make filing more efficient, and (ii) by continuing to rely on public participation as the primary means of detecting violations of the public service obligation.

Judge Bork's opinion for the majority held that the FCC did not violate the Communications Act or the Administrative Procedure Act by modifying the renewal system. Significantly, the majority noted that the FCC did not intend through the new system to establish a lower and more lenient standard for broadcasters. On the contrary, the Commission believed that it could maintain its historical high degree of broadcaster compliance with the streamlined system.

In the same fashion, Public Citizen persists in counting Judge Bork's panel opinion in Natural Resources Defense Council v. Environmental Protection Agency, 804 F.2d 710 (1986), as a decision "against" the public interest even though that panel opinion has been vacated and supplanted by a new opinion written by Judge Bork and joined by all eleven judges on the D.C. Circuit. The issue before the original panel was whether the EPA could consider the cost and technological feasibility of compliance when setting maximum emission levels for hazardous air pollutants, in this case vinyl chloride. The petitioner urged the court that the Clean Air Act does not allow EPA to consider any factor other than health when setting emission levels for vinyl chloride. The majority opinion, written by Judge Bork and joined in its entirety by Judge Edwards, concluded that the EPA's consideration of economic and technological feasibility was reasonable, and affirmed the agency's action.

Upon rehearing the case, the D.C. Circuit narrowed the analysis of the Bork-Edwards panel decision, holding that EPA may in fact consider cost and technological feasibility, but only after it determines on health considerations alone that a particular emission level provides an ample margin of public safety. Judges Bork and Edwards agreed with this analysis, and Judge Bork again wrote the opinion for the majority. Public Citizen, however, downplays this en banc opinion for two reasons. First, all ten of Judge Bork's colleagues on the D.C. Circuit joined his opinion, thereby undermining Public Citizen's contention that Judge Bork votes against public interest groups because of personal bias. Second, the unanimous en banc opinion did not vindicate the position taken by the public interest group that EPA could never take cost and feasibility into account. Public Citizen buries its discussion of the en banc opinion in a footnote, and deceptively states that an intransigent Judge Bork refused to "retract" the panel's original ruling that EPA could consider cost and feasibility. Judge Bork did not refuse to "retract" that ruling; instead, a unanimous D.C. Circuit affirmed that EPA may consider other factors - but only after the agency uses health considerations alone to set a level that assures an ample margin of public safety.

Public Citizen alleges that Judge Bork manipulated applicable law and ignored evidence in the record in order to hold against a public interest group in San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 789 F.2d 26 (D.C. Cir. 1986). These accusations are completely false. In that

case a majority of the court sitting en banc held that the NRC was not required to hold a hearing concerning the potential complicating effects of an earthquake on emergency responses to a simultaneous but independently caused radiological accident at the Diablo Canyon nuclear power plant. Judge Bork's opinion for the majority concluded that the NRC did not act arbitrarily or capriciously by failing to consider this far-fetched scenario.

Public Citizen suggests that Judge Bork gave unusually "great" deference to the agency's interpretations of its regulations; the implication, of course, is that Judge Bork showed greater deference to the agency than he otherwise would have because the petitioner was a public interest group. In reality, Judge Bork merely applied existing Supreme Court precedent that courts are not at liberty to set aside an agency's interpretation of its own regulations unless that interpretation is plainly inconsistent with the language of the regulations. See United States v. Larionoff, 431 U.S. 864, 872-73 (1977). Judge Bork also noted that under D.C. Circuit precedent, the court "need not find that the agency's construction is the only possible one, or even the one that the court would have adopted in the first instance." Belco Petroleum Corp. v. FERC, 589 F.2d 680, 685 (D.C. Cir. 1978). Judge Bork's conclusion that "great" deference was due to the decision of the NRC was routine, not remarkable, and apparently the majority of the D.C. Circuit sitting en banc agreed with him; Judges Edwards, Mikva, Scalia, and Starr joined Judge Bork's opinion.

Public Citizen also charges that the majority opinion "sidestepped" evidence indicating that NRC's refusal to grant a hearing conflicted with past agency practice. In fact, Judge Bork's opinion addressed that issue directly, and after a careful review of the record, concluded that "if petitioners suggest an inconsistency with prior Commission applications, their assertion is false . . . the Commission has never applied its regulation in any way except the way it did here." 789 F.2d at 33. Again, Judges Edwards, Mikva, Scalia and Starr joined Judge Bork on this point.

Public Citizen exhibits a gross misunderstanding of Judge Bork's dissent in Planned Parenthood Federation of America v. Heckler, 712 F.2d 650 (D.C. Cir. 1983). At issue in the case were regulations issued by the Department of Health and Human Services that required federally funded family planning programs to notify the parents of minors who received contraceptives. The majority held that the statute under which HHS issued the regulations did not, in fact, authorize the parental notification rule. Judge Bork was in complete agreement with the majority on this point. Judge Bork and the majority parted company, however, on the question of whether the statute upon which HHS relied, in addition to not authorizing the regulation, also forbade promulgation of the rule under any other statute.

Public Citizen claims that Judge Bork wanted to give HHS another chance to promulgate the regulations because the issue of parental notification involved "a vexed and hotly controverted area of morality." 712 F.2d at 665. In other words, they assert

that Judge Bork's decision was based on his views of social policy, not an interpretation of the statute. This is an outright misrepresentation of Judge Bork's analysis. What Judge Bork actually said was that because the issue was highly controversial, judges should be especially cautious not to lose sight of legal distinctions.

Though the legal reasoning in Judge Bork's dissent is sophisticated, it does not require careful reading to grasp his point: there is a vast difference between saying that a particular statute does not authorize a regulation, and saying that the statute affirmatively prohibits the regulation, superceding any other statute or authority. Judge Bork believed that by saying the latter, the majority decided too much. He concluded that there was very little evidence to show that Congress had prohibited HHS from adopting a rule requiring parental notification. Consequently, he reasoned that under Supreme Court precedent, as expressed in SEC v. Chenery Corp., 318 U.S. 80 (1943) and its progeny, a rule that cannot stand under one statute might very well be lawful if issued under a statute different from the one initially claimed. This not so subtle distinction was lost on Public Citizen.

Public Citizen claims that Judge Bork vacated an agency decision in Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission, 810 F.2d 1168 (D.C. Cir. 1987), because the objecting party was a business. This accusation makes a mockery of a difficult case that returned to the D.C. Circuit several times, and that caused the court to issue two panel

decisions and one opinion en banc in an attempt to resolve the issues.

Jersey Central made a substantial investment in a nuclear power plant, but when the project was no longer feasible for a variety of economic and political reasons, Jersey Central abandoned the plant, and thereby its investment. In an attempt to recover its unamortized costs, Jersey Central asked FERC if it could include them in its rate base, with a rate of return sufficient to cover carrying charges on its debt and on the preferred stock portions of that unamortized investment. In response, FERC issued an order that summarily and without explanation excluded the unamortized portion of the investment from the rate base. Jersey Central appealed to the D.C. Circuit, and in its first encounter with the case, a unanimous panel affirmed FERC, holding that the "end result" test that requires a rate order to be "just and reasonable" applies only to those assets which FERC rules allow to be included in the rate base.

Public Citizen mischaracterizes the case in several ways. First, Public Citizen states that when Jersey Central asked the panel to rehear the case, Judge Bork switched "his" position and "wrote two opinions siding with the utility." The implication is that Judge Bork individually, arbitrarily and improperly granted rehearing to the utility. In fact, Judge Bork could not alone grant rehearing; only a majority of a panel can exercise that discretion, and the panel in this case did so. In addition, it is misleading to say that Judge Bork switched "his" position in Jersey Central I. The opinion that Judge Bork wrote represented

the views of the panel. Public Citizen also neglects to mention that rehearing was granted because the panel found FERC's response to Jersey Central's petition seriously deficient. Finally, if the panel and en banc opinions written by Judge Bork "sided" with the utility, then a majority of the D.C. Circuit also abandoned legal principles to "side" with the utility, for majorities joined Judge Bork on both opinions.

Public Citizen employs innuendo to suggest that Judge Bork's thorough opinion in Middle South Energy, Inc. v. Federal Energy Regulatory Commission, 747 F.2d 763 (D.C. Cir. 1984), "sided" with the utilities and justified that result with a cavalier opinion that was plainly wrong. In fact, Judge Bork's majority opinion did no more than interpret and apply a provision of the Federal Power Act consistent with its plain meaning. Public Citizen notes ominously that Judge Ruth Ginsburg filed a "lengthy" dissent "taking Judge Bork to task" for his flawed opinion. In fact, Judge Ginsburg did neither. Her concise, four page dissent conceded at the outset that "the question is close," and then proceeded to explain why she would place less emphasis than the majority on the plain meaning of the statute amd more on the general intent of Congress.

Public Citizen seriously misstates the holding of National Soft Drink Association v. Block, 721 F.2d 1348 (D.C. Cir. 1983) to create the false impression that Judge Bork voted to find that the Department of Agriculture did not have the legal authority to ban the sale of soft drinks in schools which served meals to students under a federally funded program. In fact, the panel

9opinion joined by Judge Bork upheld the right of the Department to regulate soft drinks according to the provisions of the applicable statute.

Public Citizen omits this information better to accuse Judge Bork of voting "for" a business interest. Indeed, a full reading of the case indicates that, under Public Citizen's methodology, the opinion should count as a vote "against" business because the majority rejected the claim made by the soft drink industry that the Department had discriminated against soft drinks vis a vis other "junk" foods. The majority went on to hold that the Department could regulate the sale of soft drinks "in food service facilities or areas during the time of food service" as the statutory language provided. The majority also concluded that the Department had exceeded its statutory authority by attempting to regulate the sale of soft drinks throughout the schools, not only in food service areas during mealtime.

In several instances, Public Citizen counts majority opinions of the D.C. Circuit as "against" the public interest or "for" business without troubling to analyze or even mention the cases. Public Citizen lists Associated Gas Distributors v. Federal Energy Regulatory Commission, No. 85-1811 (D.C. Cir., June 23, 1987), as one of the split decisions in which Judge Bork allegedly voted for "business" and against the regulatory agency.

Such a conclusion distorts the nature of the case. The case is an extremely complex matter involving regulation of the natural gas industry; the meticulous, one hundred and twenty-five page majority opinion was written by Judge Stephen Williams, a

former professor of law and one of the nation's leading authorities on gas and energy regulation; Judge Bork joined the majority opinion; and Judge Mikva agreed with most of the majority's analysis. Interestingly, Public Citizen earlier faulted Judge Bork for disagreeing with Judge Harry Edwards in a labor case because Judge Edwards was, as Public Citizen described him, "formerly a law professor and management-side labor lawyer." By not discussing Associated Gas, Public Citizen avoids calling attention to the fact that the opinion Judge Bork joined also was written by a former law professor who is an expert in the subject matter of the case.

Public Citizen also lists Norfolk & Western Railway Co. v. United States, 768 F.2d 373 (D.C. Cir. 1985), as a decision for "business." In reality, the case involved competing business interests, with one side (paper and aluminum manufacturers) intervening on behalf of respondents, the United States and the Interstate Commerce Commission. The petitioners, various railroads, asked the court to review an order of the I.C.C. that authorized shippers of recyclable products to seek freight refunds and reductions from the railroads. At stake was whether the railroads would have to subsidize the shipping costs incurred by manufacturers.

Judge Bork's majority opinion held that the railroads' petition for review of the I.C.C. order was not barred by statute or by principles of res judicata, and that the I.C.C. erred in authorizing shippers of recyclable products to seek reductions and refunds in addition to the rate reductions already in

existence. Contrary to what one might expect after reading public citizen's biased presentation of Judge Bork's voting record, Ruth Ginsburg, a "liberal" judge, joined the majority opinion, while Kenneth Starr, a "conservative," dissented.

Public Citizen tells us that Judge Bork once again voted "against" the public interest in Council of and for the Blind of Delaware County Valley, Inc. v. Regan, 709 F.2d 1521 (D.C. Cir. 1983). What Public Citizen does not tell us is that this decision was a lengthy en banc opinion written by Judge Wilkey and joined by Judges Bork, Scalia, Ruth Ginsburg (a Carter appointee), Tamm (a Johnson appointee), and MacKinnon. The dispute involved the way in which the Office of Revenue Sharing handled complaints that federal funds distributed to state and local governments were being used in programs that discriminated illegally against minorities, women and other groups. The D.C. Circuit ruled that the appellants could not bring a private civil action against the Office of Revenue Sharing for failing to perform its duties. A dissent written by Chief Judge Robinson and joined by Judges Wright, Wald, Mikva and Edwards agreed with the majority's analysis but went on to suggest that appellants might refile their claim as a class action.

Finally, Public Citizen discusses but downplays the twin cases that it counts as a vote by Judge Bork for the public interest and against the executive. In Kennedy for President Committee v. F.E.C., 734 F.2d 1558 (D.C. Cir. 1984) and Reagan for President Committee v. F.E.C., 734 F.2d 1569 (D.C. Cir. 1984), majority opinions by Judge Wald reversed an order of the

FEC regarding repayment by candidates of matching federal funds. A complete discussion of the cases would compel Public Citizen to admit that Judge Bork joined majority opinions written by "liberal" Judge Wald, while "conservative" Judge Starr dissented from the Wald-Bork majority.

2. Labor Law

In five years on the D.C. Circuit, Judge Bork has decided forty-six labor law cases and has dissented only twice. He has rendered such important "pro-labor" decisions as United Mine Workers of America v. MSHA, No. 86-1239 (July 10, 1987) (agency cannot exclude individual mining companies from compliance with mandatory safety standard), United Scenic Artists v. NLRB, 762 F.2d 1027 (D.C. Cir. 1985) (secondary boycott by union not an unfair labor practice), Amalgamated Transit Union v. Brock, 809 F.2d 909 (D.C. Cir. 1987) (reversing Secretary of Labor's certification that "fair and equitable arrangements" had been made to protect collective bargaining rights), Northwest Airlines v. Air Line Pilots Association International, 808 F.2d 76 (D.C. Cir. 1987) (alcoholism a "disease" not constituting good cause for pilot's dismissal), and Munsey v. Federal Mine Safety and Health Review Comm'n, 701 F.2d 976 (D.C. Cir. 1983) (miner entitled to costs and attorney's fees even for period in which he received free representation from his union's legal counsel). In total, he decided in favor of the union or employee in nineteen cases, and for the employer in nineteen cases. Eight cases yield mixed or ambiguous results when judged by the standard of "who won." Not one of the reports contest that Judge Bork's overall

labor record is other than fair and balanced. There is no discussion of Judge Bork's important pro-labor briefs as Solicitor General.[122]

In fact, from among all forty-six cases, the AFL-CIO specifically criticize only two[123] and the Biden Report three.[124] The Public Citizen report adds three more, including one decision where the Public Citizen admits that "Judge Bork ruled in favor

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[122] As Solicitor General, Bork took pro-union or pro-employee positions in important cases involving substantive questions of labor law, such as the coverage of minimum wage requirements, the scope of unions' exemption from antitrust law, or the reach of state anti-union "right to work" laws. See Briefs for United States in National League of Cities v. Usery 426 U.S. 833 (1976) (dissents of Justices Brennan, White, Marshall and Stevens accepted Solicitor General's position that Fair Labor Standards Act could be applied to employees of state governments); Falk v. Brennan, 414 U.S. 190 (1973) (dissent of Brennan, Douglas, White and Marshall accepting Solicitor General's position that real estate broker/manager a covered enterprise subject to FLSA minimum wage requirements); Oil, Chemical & Atomic Workers v. Mobil, 426 U.S. 407 (majority accepting Solicitor General's argument that states could not give extraterritorial effect to anti-labor "right to work laws."); see also Briefs for Solicitor General defending pro-labor positions taken by the NLRB or Labor Department in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975) (majority accepting Solicitor General's argument that employer violated employees' right by denying request for union representative to be present during an investigative interview); Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973) (remedial order to reinstate employee with backpay); NLRB v. Savair Mfg. Co, 414 U.S. 270 (1973) (arguing union waiver of $10 initiation fee before election not an improper inducement); NLRB v. Magnavox Co., 415 U.S. 322 (collective bargaining agreement barring distribution of literature during non-work hours in non work-areas of company-owned property abridged employee's NLRA rights); Hudgens v. NLRB, 424 U.S. 507 (1976) (arguing owner of large shopping center violated the NLRA by prohibiting strikers from picketing entrance to retail store leased by struck employer from the shopping center owner).

[123] ACTWU v. NLRB, 736 F.2d 1559 (D.C. Cir. 1984); Restaurant Corp. of America v. NLRB, 801 F.2d 1390 (D.C. Cir. 1986).

[124] Restaurant Corp. of America v. NLRB, 801 F.2d 1390 (D.C. Cir. 1986); Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985); Oil, Chemical & Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984).

of a labor union,"[125] and one decision in which Judge Bork concurred in the result favoring the union.[126] Thus, the bottom line, even before examining the cases in specific, is that among researchers not reticent to criticize Judge Bork's record, they can locate only seven decisions in total to criticize, and only five where the result is "anti-union." Only one of Judge Bork's labor decisions is criticized by all three reports.[127] Moreover, among the split decisions, the AFL-CIO, even with its highly questionable methodology, admits that Judge Bork found in favor of the union twice,[128] voted in the majority six of seven times,[129] and voted with "liberal" judges in four of the seven cases.[130] This is hardly the record of an extremist.

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125 Public Citizen at 43-44, discussing NTEU v. FLRA, 800 F.2d 1165 (D.C. Cir. 1986).

126 Amalgamated Clothing Textile Workers Union v. NLRB, 736 F.2d 1559 (1984). Public Citizen admits "Judge Bork joined the majority in upholding an NLRB decision against an emloyer" (Public Citizen, at 42). Its sole critical remark is that Judge Bork wrote a concurring opinion "which found narrower grounds for the ruling than did the majority, and which also allowed the NLRB less discretion in the area." Id. The report also notes that Bork complained that the majority "needlessly criticized" a Fourth Circuit opinion. Id. That is the entire substance of Public Citizen's discontent with Judge Bork's ruling in this case.

127 Restaurant Corp. of America v. NLRB, 801 F.2d 1390 (D.C. Cir. 1986).

128 NTEU v. FLRA, 800 F.2d 1165 (1986); York v. MSPB, 711 F.2d 401 (1983).

129 In five years, his single dissent among the "critical" split decision cases, said to be so indicative of Judge Bork's extremism, is Prill v. NLRB, 755 F.2d 941 (1985).

130 AFGE v. FLRA, 778 F.2d 850 (D.C. Cir. 1985) (Wald, for majority, joined by Bork); Simplex Time Recorder v. Secretary of Labor, 766 F.2d 575 (1985) (Davis, for majority, joined by Bork); NTEU v. FLRA, 800 F.2d 1165 (1986) (Bork, for majority, joined by Robinson); York v. MSPB, 711 F.2d 401 (1983) (Bork, for majority,

In analyzing the split decisions, the first and obvious point is that these cases are not necessarily among Judge Bork's most important or closest labor votes. For instance, in Meadows v. Palmer, 775 F.2d 1193 (D.C. Cir. 1985), Judge Bork joined a unanimous opinion by Judge Mivka. Judge Bork wrote for the majority on only one separate point. He affirmed the grant of summary judgment by the district court that an employee assigned to a new job at the same grade, with the same pay and same organization standing, presented no genuine of issue of material fact that he was reduced in rank. In the context of an otherwise unanimous decision, the decision by two circuit judges to affirm the finding of a district court judge on a limited matter of evidence proves nothing. Certainly it proves no more than Judge Bork's vote in Harvey v. MSPB, 802 F.2d 537 (D.C. Cir. 1986), reversing the decision of the Merit Service Protection Board ("MSPB") to demote an employee, or the holding in FLRA v. Social Security Administration, 753 F.2d 156 (D.C. Cir. 1985), that the agency committed an unfair labor practice by failing to negotiate over compressed work schedules.

The AFL-CIO report also criticizes Judge Bork for joining with Chief Judge Wald in AFGE v. FLRA, 778 F.2d 850 (D.C. Cir. 1985). In that case, Judge Wald, a Carter appointee not often accused of harboring an anti-labor bias, held that the government labor relations agency cannot be required to approve a contract it reasonably construes to violate a law, rule, or regulation. Not surprisingly, none of the reports mention this "anti-labor"

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130 (Cont.) joined by Wright).

case anywhere except in their statistical compilations. Nor do they highlight Judge Bork's decision in York v. MSPB, 711 F.2d 401, where, joined by Judge J. Skelly Wright, he refused to allow the MSPB to affirm the dismissal of a postal worker when the agency failed to explain the basis for its holding or its standards for granting reconsideration. Not only did the majority reverse the agency but the majority rejected the views of Judge MacKinnon, who would have upheld the dismissal.

Among all the reports, only Public Citizen's criticizes Judge Bork's majority opinion in NTEU v. FLRA, 800 F.2d 1165 (D.C. Cir. 1986), where he held that a union had no statutory duty to provide lawyers to represent nonunion members to the same extent it would provide lawyers for union members. Former Chief Judge Robinson joined in the opinion. Together, they stand accused by Public Citizen of "reinforcing the positions of established institutions" and refusing to give the agency proper deference." (Public Citizen, at 44) The only "established institution" in this litigation was the labor union. Similarly, the "improper deference" led Judges Bork and Robinson to upset an agency ruling against the union. Yet the Public Citizen report says, in the very next sentence and without any support whatsoever, that Judge Bork in close cases "sided regularly with management (either business or government) against labor." (Public Citizen, at 44) In fact, of the seven split labor decisions, only five involved agencies, and by the AFL-CIO's own

count, Judge Bork reversed the agency twice.[131] Moreover, Judge Bork disagreed with the agency in at least thirteen other decisions. As to Judge Bork's alleged complicity with business, only five of his forty-six labor cases involved litigation between private parties. No pattern can be discerned among the decisions, even assuming this small sample was in any way relevant.[132]

In Restaurant Corp. of America v. NLRB, 801 F.2d 1390 (D.C. Cir. 1986), two employees were discharged for violating a rule prohibiting solicitation in the workplace. The majority, though admitting the individuals had violated a valid rule, concluded that it would be unfair to affirm one of the discharges because the employer also allowed employees to solicit among themselves to buy birthday presents and farewell gifts for co-workers. Judge Bork found the record to contain no evidence that these

131 NTEU v. FLRA, 800 F.2d 1165 (D.C. Cir. 1986); York v. MSPB, 711 F.2d 401 (D.C. Cir. 1983).

132 Northwest Airlines v. Air Line Pilots Association International, 808 F.2d 76 (D.C. Cir. 1987) (upholding labor arbitrator's decision to reinstate pilot charged with flying under influence of alcohol); Devine v. Pastore, 732 F.2d 213 (D.C. Cir. 1984) (arbitrator exceeded his authority in ordering reduction of penalty against employee who stole merchandise); Oil, Chemical & Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984) (Occupation Safety and Health Act does not provide a remedy for women who can safely work in hazardous facility unless sterilized to avoid risk to fetus); International Union v. National Right to Work Legal Defense, 781 F.2d 928 (D.C. Cir. 1986) (case remanded to FLRA for determination of whether federal agency had unlawfully helped one union at the expense of a rival union); Washington Hospital Center v. Service Employees International Union, Local 722, 746 F.2d 1503 (D.C. Cir. 1984) (affirming district court order requiring employer to arbitrate certain labor grievances; reversing grant of attorneys' fees to union because employer's position was not frivolous). Of course, all the labor decisions involve businesses, but in the remaining opinions, the court is reviewing the decision of an agency, not

latter "solicitations" caused a comparable disruption. Indeed, it was Judge Bork's position that the National Labor Relations Act did not require employers to eliminate "morale boosting" gift-giving among employers to avoid the risk of sanctions for unequal enforcement of the no-solicitation rule, a rule that jointly protects employers and employees from disruptive solicitation in the workplace. Moreover, the Biden report flagrantly misstates Judge Bork's position as holding that the "employer was allowed to assume that union solicitation was per se disruptive and inconsistent with employee morale." (Biden Report, at 41) Judge Bork made no such finding.

Both the Biden and Public Citizen reports condemn Judge Bork for his only other dissenting decision, Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), upholding the NLRB's definition of concerted activity. Nonetheless, the studies accuse him of demonstrating "insensitivity to workplace safety." Public Citizen concludes that "Judge Bork was attempting to substitute his own understanding of industrial realities and desirable federal labor policies for the analysis that might be forthcoming if the administrative agency were permitted to address those issues in the first instance" (Public Citizen, at 37). Both criticisms are unfounded.

The charge of insensitivity assumes that judges apply the law written by Congress and entrusted to agencies in light of their own proclivities. This is quite clearly wrong, for if Congress has chosen to limit recovery or deny a specific work-

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132 (Cont.) the dispute alone.

place recovery, it is not proper for any judge, no matter how sensitive, to rule otherwise. This result-oriented critique also conveniently ignores Judge Bork's "pro-safety" cases such as Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984), where he reversed the Federal Mine Safety and Health Review Commission and held that a slate gravel processing facility which did not itself extract slate was nonetheless a "mine" and therefore subject to civil penalties for safety violations in the workplace.[133] Likewise, it assumes that Judge Edwards, who wrote the majority opinion in Prill, should be reprimanded for his insensitivity in Council of Southern Mountains v. Federal Mine Safety, 751 F.2d 1418 (D.C. Cir. 1985), where he upheld an agency decision that a coal company could bar a citizens' organization representing coal miners from monitoring safety training programs on company property.

In fact, a careful reading of Prill discloses that no such debate about "sensitivities to workplace safety" was at issue. Judge Edwards, writing for the majority, concluded the Board improperly assumed that Congress mandated a standard it might well be free to adopt in its own discretion. Judge Bork, by contrast, wrote that the majority has nowhere demonstrated or even claimed the NLRB regulation at issue was not reasonable. He therefore felt bound by the bedrock principle of administrative law that courts defer to reasonable agency constructions of congressional statutes, in this case section 7 of the National Labor Relations Act.

133 See also United Mine Workers of America v. MSHA, No. 86-1239

Finally, Public Citizen attacks Judge Bork's opinion in Oil, Chemical & Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984). Public Citizen's treatment of the case has already been discussed above, but it need be reemphasized that Judge Bork's opinion, which then-Judge Scalia and Senior District Judge Williams joined, is anything but an endorsement of sterilizing workers.

The attacks on Judge Bork's labor record are virulent in tone and empty of substance. The Biden report, for example, based on a half-page analysis referring to exactly one case, Restaurant Corp. of America v. NLRB, charges that "Judge Bork's opinions on labor issues have markedly favored employers." (Biden report, at 41) By any standard, Judge Bork's record in the realm of labor disputes demonstrates an even-handed, unbiased attempt to apply statutes as written by Congress, review decisions of the agencies for legal error, and fairly adjudicate disputes among private parties.

3. Disclosure Statutes

The AFL-CIO study claims that Judge Bork has voted reflexively in favor of the government in all nine nonunanimous cases involving disclosure statutes.[134] This claim is flawed on several bases. First, the study suggests that a vote for the

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133 (Cont.) (D.C. Cir. July 10, 1987) (MSHA could not exclude individual mining companies from compliance with a mandatory safety standard); Oil Chemical & Atomic Workers International v. NLRB, 806 F.2d 269 (D.C. Cir. 1986).

134 Public Citizen, by contrast, maintains that in seven nonunanimous disclosure statute cases, Judge Bork sided with the executive in each case.

government is a vote against the individual. This ignores the fact that disclosure cases often implicitly involve competing claims between a claimant seeking disclosure and a citizen for whom disclosure of information may well be a serious invasion of privacy. Second, the duty of the judge is to apply the law in every case, not to vote for or against a particular result some number of times. That is the way to measure the political acceptability of one's elected representatives, not to assess the quality of a judge's neutral application of legal principles. Third, the statutory balance between confidentiality and disclosure that Judge Bork strikes in these cases is often joined by other judges or justices, including many who would be considered moderate or liberal.

Several of the cases cited have involved the ability of the government to protect the confidentiality of those who voluntarily supply our government with information vital to our national security. Because these intelligence sources generally must operate in secret, often at great personal risk, it is essential that the government be able to ensure their confidentiality. The study criticizes Judge Bork and, implicitly, numerous other judges for giving full effect to the statutory policy of protecting such sources from disclosure.

In the case of McGehee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983), for example, the AFL-CIO writes that, "[in a] FOIA suit against CIA, Bork would not broadly define and allow disclosure under 'intelligence sources' exception" to disclosure. First, Judge Bork concurred with Judges Edwards and Wright on virtually

all of the points in the opinion, which established the general rule that "all records in agency's possession, whether created by the agency itself or by other bodies covered by the Act, constitute 'agency records.'" This holding was strongly pro-disclosure.[135] On the one point on which Judge Bork dissented from the original panel opinion -- the compelled disclosure of intelligence sources -- the panel later reconsidered its holding and unanimously adopted Judge Bork's position that the CIA had submitted credible affidavits supporting the exemption of documents from disclosure because of the threat posed to confidential intelligence sources. McGehee v. CIA, 711 F.2d 1076 (D.C. Cir. 1983). While acknowledging that the United States petitioned for rehearing and the petition was granted, the study inexplicably neglects to mention this latter point. Thus, by cavalierly dismissing the opinion as a case "in which Bork voted for the government" (AFL-CIO, at 3), the AFL-CIO distorts the numerous and complex issues at play in the case, and willfully ignores the fact that Judge Bork ultimately persuaded Judges Edwards and J. Skelly Wright that the statute required the protection of the sources, a conclusion with which district judge Oliver Gasch, a Johnson appointee, had also agreed.

Similarly, in Sims v. CIA, 709 F.2d 95 (D.C. Cir. 1983), another split decision for which the AFL-CIO criticizes Judge Bork's dissenting position, the majority held that an informant is not an intelligence source, even though the government had

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[135] Judge Bork also joined in the court's holding that the CIA "time-of-request cut-off date" procedure is/was unreasonable.

promised confidentiality. By making the question of disclosure dependent on an after-the-fact decision by a federal court as to whether the intelligence was available to the government from other sources, the majority opinion not only would have forced the United States to dishonor earlier promises of confidentiality by court order, but also would have threatened both the safety of existing sources and the willingness of individuals to supply vital national security information in the future. But these calamitous consequences were averted by the Supreme Court. In an opinion by Chief Justice Burger, joined by Justices White, Blackmun, Powell, Rehnquist, Stevens, and O'Connor, the Supreme Court adopted Judge Bork's position and explicitly referred to his separate opinion in doing so. See United States v. Sims, 471 U.S. 159 (1985). This resounding endorsement of Judge Bork's reading of the statute strongly suggests that the AFL-CIO's concerns are not within the mainstream of legal thought.

In three of the remaining seven cases, the issues were deemed significantly important to require argument before all the active judges on the D.C. Circuit. A brief review of these confirms that the claims of reflexive pro-government voting are wholly unsupported. In all of these cases, Judge Bork voted with a majority in which at least one judge was a Carter appointee, and, in two of the cases, he was with three judges appointed by Democratic presidents. More importantly, in none of these cases do the groups make any colorable claim that the judges in the majority erred on the law.

In Doe v. United States, No. 84-5613 slip op. (D.C. Cir., June 19, 1987), Judge Ruth Ginsburg, a Carter appointee, wrote an opinion for seven of eleven judges, holding that the Privacy Act permits an agency to fulfill its obligation to maintain the accuracy of records by putting in the files conflicting accounts of an event when requested to do so by the person on whom the file is maintained. Not requiring an agency to settle definitively all claims of error in a record, when there exists the reasonable alternative of placing in the file evidence of both sides of the disputed point, is fully consistent with the statutory obligation of "fairness" to the person on whom the file is maintained. Judge Bork's agreeing with Judge Ruth Bader Ginsburg's views on this technical, statutory matter hardly support the claim that he is some species of judicial authoritarian.

Similarly, in Clark-Cowlitz Joint Operating Agency v. FERC, 798 F.2d 499 (D.C. Cir. 1986) (en banc), Judges Bork, Scalia, Silberman, Robinson, Edwards, Ruth Bader Ginsburg, Starr, and Buckley, agreed that a municipal agency had no right to a transcript of a private meeting of a federal agency at which litigation strategy was decided. Applying the statutory exemption protecting this traditionally privileged information, Clark-Cowlitz preserves the ability of the government commissions to conduct effective litigation by ensuring that their legal strategy meetings can proceed in full candor, without fear of subsequent disclosure. This opinion, a sound application of the underlying statutory terms and policies, widely accepted by members of the D.C. Circuit, is hardly cause for alarm.

In Church of Scientology v. Internal Revenue Service, 792 F.2d 154 (D.C. Cir. 1986) (en banc), cert. granted, 107 S. Ct. 947 (1987). Judge (later Justice) Scalia wrote the en banc majority opinion, holding that the Internal Revenue Service could not disclose any part of a privileged tax return, even if the privileged information was expunged. This position was joined by Judges Bork, Robinson, Edwards, Ruth Bader Ginsburg, Starr, Silberman, and Buckley. Since most people file tax returns, this decision is strongly protective of the privacy interests of the average citizen. It indicates clearly the fallacy of counting every vote in favor of the government's position as being a vote against the average person. Disclosure to someone is also disclosure about someone, and the courts must take both considerations into account according to the dictates of the statutes they apply. All of these considerations confirm that the AFL-CIO's approach of attempting to draw meaningful conclusions merely by counting noses for or against the government is simplistic and uninformative.

In his dissent in Wolfe v. Department of Health & Human Services, 815 F.2d 1527 (D.C. Cir. 1987), Judge Bork argued that the petitioner could not compel disclosure of "regulatory logs," which are tracking sheets that indicate the status of proposed regulations as they pass through the various phases of government deliberation. Judge Bork expressed the strong concern that the majority's decision would chill executive branch deliberations. This concern is certainly not novel, nor is it indicative of some pro-government bias. First, the Supreme Court in United States

v. Nixon, 418 U.S. 683 (1974), clearly recognized the important interest in protecting confidential executive branch deliberations. In an opinion by Chief Justice Burger, joined by Justices Douglas, Brennan, Stewart, White, Marshall, Blackmun, and Powell, the Court noted "the public interest in candid, objective, even blunt or harsh opinions" in executive decisionmaking, and that the executive branch "must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express, except privately." 418 U.S. at 708. Second, Congress was plainly mindful of that interest when it codified an exemption to disclosure under FOIA for deliberative processes. Third, the full court in the D.C. Circuit apparently believed that Judge Bork's opinion raised sufficient questions about the compelled disclosure of this deliberative material to schedule the case for a hearing by the full en banc court.

Counting Washington Post Co. v. U.S. Dept. of State, 685 F.2d 698 (D.C. Cir. 1982), moreover, among the sample of divided cases is plainly inappropriate. The opinion joined by Judge Bork was a dissent from denial of rehearing en banc, which is not an opinion on the merits, but merely indicates the view that the case merits further consideration by the full court. Second, the opinion joined by Judge Bork was written by Judge (later Justice) Antonin Scalia. Third, the issue that troubled Judges Bork and Scalia was that the panel, rejecting a claim of exemption, ordered disclosure of sensitive materials to a private citizen under FOIA when a distinct statute had subsequently sharply

limited the disclosure of identical materials to agents of Congress. The structure of the related statutes therefore seemed to militate against disclosure. This careful and conventional mode of statutory analysis can by no means be taken as evidence of an activist approach to FOIA cases.

Dettman v. United States Department of Justice, 802 F.2d 1472 (D.C. Cir. 1986), counted among the cases that evince a judicial bias in favor of the government, was nothing more than a routine case in which the requestor had failed to comply with the clear requirement that she present her objections to the agency before seeking relief in court. In Greenberg v. FDA, 803 F.2d 1213 (D.C. Cir. 1986), the last of the cases cited, Judge Bork dissented from a panel holding that a business could use the Freedom of Information Act to obtain customer lists that a competitor had been required to provide to the government. This was not a case, in fact, between the government and a citizen, but between two rival businesses. By not finding that such information was exempt from disclosure as "confidential" information, the majority risked making FOIA a tool for unfair trade practices and misappropriation.

Thus, in no case is the AFL-CIO able to establish that Judge Bork has a reflexive pro-government approach. In many of these cases, disclosure to one party was at the expense of an invasion of the privacy of another party. It is difficult to understand why the latter carried no weight at all in the AFL-CIO's calculus of public interest. In the vast majority of the cases cited, moreover, Judge Bork was joined by at least one liberal to

moderate judge, if not most of the Supreme Court. Thus, the AFL-CIO has made no colorable claim that Judge Bork was not deciding these cases correctly, in accordance with the principles of statutory construction, rather than in accordance with his own views.

F. Antitrust

As the author of numerous scholarly articles on antitrust[136] and of The Antitrust Paradox, a book comprehensively analyzing the history, theory, case law, and practical economic implications of antitrust, Judge Bork has advanced the view that the goal of antitrust is to promote consumer welfare. The position advanced by Judge Bork has had perhaps a greater

136 See, e.g., Bork, Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception, 22 U. Chi. L. Rev. 157 (1954); Bork, Anticompetitive Enforcement Doctrines Under Section 7 of the Clayton Act, 39 Tex. L. Rev. 832 (1961); Bork, Control of Sales, 7 Antitrust Bull. 225 (1962); Bork & Bowman, The Crisis in Antitrust, 9 Antitrust Bull. 587 (1963) & 65 Colum. L. Rev. 363 (1965); Bork & Bowman, Antitrust for Australia? -- An Evaluation of the American Experience, 39 Australian L.J. 152 (1965); Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part I, 74 Yale L.J. 775 (1965); Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part II, 75 Yale L.J. 373 (1966); Bork, Legislative Intent and the Policy of the Sherman Act, 9 J. Law & Econ. 7 (1966); Bork, panelist, An Interview with the Honorable Donald F. Turner, Assistant Attorney General, Antitrust Division, 30 A.B.A. Sec. Antitrust L. 100 (1966); Bork, Conflicts Between Patent and Antitrust Laws?, Idea, vol. 10, p. 38 (1966); Bork, The Supreme Court Versus Corporate Efficiency, Fortune, vol. 76, p. 92 (Aug. 1967); Bork, A Reply to Professors Gould and Yamey, 76 Yale L.J. 731 (1967); Resale Price Maintenance and Consumer Welfare, 77 Yale L.J. 950 (1968); Bork, Separate Statement of Robert H. Bork, Report of the White House Task Force on Antitrust Policy, 2 J. L. & Econ. Rev. 53 (1968-69); Bork, Antitrust in Dubious Battle, 44 St. John's L. Rev. 663 (1970); Debate -- Resolved: Present Antitrust Restraints on Pricing Should Be Relaxed, 41 Antitrust L.J. 8 (1971); Bork, Vertical Restraints: Schwinn Overruled, 1977 Sup. Ct. Rev. 171; Bork, Statement of Robert H. Bork, The National Commission for the Review of the Antitrust Laws, 48 Antitrust L.J. 891 (1978-

influence on the development of antitrust law than the views of any other commentator. Indeed, since its publication, Professor Bork's formidable book has been cited approvingly in no fewer than six majority opinions by such diverse justices as Brennan,[137] Powell,[138] Stevens,[139] and Chief Justice Burger,[140] as well as in Justice O'Connor's influential opinion concurring in the judgment in Jefferson Parish Hospital District No. 2 v. Hyde[141] and in Justice Blackmun's dissenting opinion in National Society of Professional Engineers v. United States.[142] Every justice currently sitting on the Supreme Court has joined an opinion citing Judge Bork's book with approval. This can suggest only that Judge Bork has taken a respected position firmly within the mainstream on antitrust.

Recently, moreover, fifteen past chairmen of the Antitrust Section of the American Bar Association wrote a letter stating: "Fortunately, the mainstream view, which no one has helped to

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136 (Cont.) 79); Debate: Should the Sherman Act Be Amended to Broaden the Offense of Attempt to Monopolize?, 48 Antitrust L.J. 1433 (1979).

137 Cargill, Inc. v. Monfort of Colorado, Inc., 107 S. Ct. 484, 495 n.17 (1986).

138 Matsushita Elec. Indus. v. Zenith Radio, Co., 106 S. Ct. 1348 (1986).

139 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 105 S. Ct. 2847 (1985); N.C.A.A. v. Board of Regents, 468 U.S. 85, 101 (1984).

140 Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979); United States v. United States Gypsum Co., 438 U.S. 422, 442 (1978).

141 466 U.S. 2, 36 (O'Connor, J., with whom Burger, C.J., Powell and Rehnquist, JJ., joined, concurring in the judgment).

142 435 U.S. 679, 700 n.27 (Blackmun, J., with whom Rehnquist, J., joined, dissenting).

promote more than Judge Bork, is that the proper antitrust policy is one that encourages strong private and government action to promote consumer welfare rather than unnecessary intervention to protect politically favored competitors." See Kramer, The Brief on Bork, U.S. News & World Report, Sept. 14, 1987, at 23. This broad consensus among leading attorneys in the area of Judge Bork's pathbreaking work serves as clear confirmation that his views on antitrust are not only well within, but, indeed, define, the mainstream.

Judge Bork's view of antitrust is a strikingly simple one. He believes that the goal of antitrust laws is to maximize the welfare of consumers by way of applying legal rules that rely on economic principles to enhance output and reduce price. Far from being an activist position, however, as charged by the Biden report (at 36-37), this theory of the antitrust laws is largely derived from a careful analysis of the language of the statutes and their legislative history. See R. Bork, The Antitrust Paradox at 56-66 (1978); Bork, Legislative Intent and the Policy of the Sherman Act, 9 J. L. & Econ. 7 (1966). Indeed, Judge Bork has expressly considered what should inform judges in applying the relatively open-textured antitrust laws, and he has urged upon them such considerations as respect for the legislative process and the policy choices that emerge from it, the structural limitations of an unelected judiciary in a democratic polity, the need for predictability in the law, and the need for judicially manageable standards for decision. The Antitrust Paradox at 79-88. This scarcely sounds like a prescription for activism.

The Biden report disputes Judge Bork's view of the history and meaning of the antitrust statutes, and the study cites Dean Robert Pitofsky to support its apparent view that the antitrust laws should be used as a leveler of wealth and political influence and as a means to protect small businesses from competition. (Biden Report, at 34). This claim is, of course, completely at odds with Chief Justice Burger's opinion for the Court in Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1978),[143] holding that the legislative history suggests that "Congress designed the Sherman Antitrust Act as 'a consumer welfare prescription.' R. Bork, The Antitrust Paradox at 66 (1978)." Because eight members of the Supreme Court cited the legislative history section of Judge Bork's book in support of its conclusion regarding consumer welfare, the Biden report's criticisms on this score should not be credited.

In a further effort to support its claim of antitrust activism, the Biden report discusses a passage from The Antitrust Paradox, the thrust of which, the report argues, is that Judge Bork believes "that a judge should refuse to enforce statutes or judicial precedents that do not adhere to the individual judge's understanding of the reasons behind an entire body of law." (Biden Report, at 37). In fact, what Judge Bork was arguing was that, when Congress delegates legislative power to a court through the adoption of broadly termed statutes, the court should not fashion "utterly arbitrary" rules based on the open-textured

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[143] The Chief Justice was joined by Justices Stewart, White, Marshall, Blackmun, Powell, and Rehnquist. Justice Brennan did not participate.

language provided, when the statutes by their terms "leave the ultimate economic judgment" to the courts. The Antitrust Paradox at 410.

This modest assertion -- that is, that courts should not fashion absurd rules of law when given a choice -- is not "activism." Indeed, the prescription is premised directly on the legislature's having a broad delegation and giving the courts enough discretion to avoid absurd rules while remaining within the bounds of the statute. In the context the report cites -- the Clayton Act and the Robinson-Patman Act -- Judge Bork notes that Congress has given courts the power to condemn practices that "limit competition." The Antitrust Paradox at 410-411. Because Congress has by this delegation authorized the courts to make economic judgments, a court should apply economic principles rationally to implement this broad mandate and should condemn no practice that is not harmful to competition, even if there is some indication that the legislature would itself condemn such a practice if it were to make the policy choice delegated to the court. Judge Bork makes clear, however, that the democratic process is to be respected when Congress has spoken:

> Congress may think [the court's] judgment wrong, or it may have other reasons to outlaw certain of the practices involved. Should it enact a law describing what is to be outlawed, or enunciating criteria that we are capable of applying, we will of course enforce that law.

The Antitrust Paradox at 411. Indeed, in the only sentence that the Biden report omits from the passage it cites, Judge Bork specifically contrasts the case of an open-ended delegation from

the case in which the legislature itself crafts "arbitrary or pernicious rules." The Antitrust Paradox at 410.

The Biden report also takes issue with Judge Bork's most celebrated antitrust opinion, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986). The report argues that Judge Bork's activism is evidenced in this case by his use of market power to determine whether an integrated group of businesses acting together as a van line could produce an anticompetitive and, therefore, unreasonable result. (Biden Report, at 38). Without taking on Judge Bork's conclusion that the defendants had no market power and could therefore produce no anticompetitive result, the Biden report revisits its earlier argument that antitrust has ancillary goals (besides consumer welfare) that might not be accounted for under Judge Bork's test. Thus, again, this accusation of activism boils down to the proposition that the unelected, life-tenured federal judiciary -- in the name of antitrust laws that proscribe, for example, unreasonable restraints of trade -- should take on such roles as redistributing wealth, equalizing political power, and protecting small businesses from competition.[144]

Public Citizen also criticizes Rothery, and, while its criticisms are certainly more substantial than those leveled by the Biden report, they nonetheless remain in the realm of the frivolous. Public Citizen objects, it seems, to Judge Bork's reliance on the defendants' six per cent market share to conclude

[144] Public Citizen evidently objects to the view that the exclusive goal of antitrust should be consumer welfare. (Public Citizen, at 121-22) This is a curious view for a public interest group

that no market power was present and that there could be no unreasonable restraint of trade. (Public Citizen, at 121) This view is contradicted by both case law and scholarly writings. In his opinion in United States v. Grinnell Corp., 384 U.S. 563, 571 (1966), Justice Douglas, joined by Chief Justice Warren and Justices Black, Clark, Brennan, and White, indicated that power in a market is in large measure determined by a firm's market share. Harvard Law Professors Areeda and Turner, whose popular antitrust treatise is regarded as authoritative, have suggested that a market share of 30 per cent or less presumptively establishes a lack of power to produce a monopolistic result in a market. 3 P. Areeda & D. Turner, Antitrust Law ¶ 835c, at 350 (1978); accord 3 J. Von Kalinowski, Antitrust Laws and Trade Regulation § 8.02[3], at 8-34 to 8-34.2 & n. 71 (1986). Judge Ruth Bader Ginsburg also unqualifiedly joined Judge Bork's opinion. Thus, the claim that Judge Bork was reaching out to decide Rothery on a novel theory of antitrust law is wholly unsupportable.[145]

The objections of the reports to Judge Bork's antitrust record thus stem from a basic disagreement over the proper goals of such laws. This quarrel is one that the groups will have to take up with Congress, for the view of antitrust that Judge Bork has derived from the language, structure, and history of antitrust law has largely become prevailing doctrine in the Supreme Court.

G. The Role of Federal Courts

144 (Cont.) connected with consumer activist Ralph Nader.

145 His other antitrust cases, FTC v. PPG Indus., 798 F.2d 1500 (D.C. Cir. 1986) and Neumann v. Reinforced Earth Company, 786 F.2d 424 (D.C. Cir. 1986), involved mainly procedural issues and did not

By lumping together the quite different issues of justiciability, standing, sovereign immunity, preclusion of review, statutes of limitations, and awards of attorney's fees, Public Citizen is able to assert that Judge Bork "voted in favor of closing the courthouse door" in each of 14 non-unanimous decisions raising one of these issues. The impression Public Citizen seeks to create is that Judge Bork is an extremist who seeks to bar civil rights and public interest plaintiffs from court but welcomes the claims of business and the government. In fact, it is Public Citizen that is extremist. Implicit in its result-oriented methodology and in its rhetoric is the view that the proper role of the federal courts is activist intervention to remake the laws in accord with the political agendas of favored special interest groups. Accordingly, any legal doctrine which stands in the way of an unlimited license to promote political agendas in the courts is seen as an obsolescent technicality -- whether that doctrine rests on congressional choice, on judicial self-restraint, or on the "case-or-controversy" limits on the role of the federal courts contained in Article III of the Constitution.

Contrary to its protestations, Public Citizen finds Judge Bork uncongenial precisely because he applies the constitutional and statutory limitations on the role of the federal courts (and on the ability of litigants to use those courts) neutrally, evenhandedly, and carefully. For Public Citizen, "the business of the federal courts is correcting constitutional errors, and . . . 'case and controversies' are at best convenient vehicles for doing so and at

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145 (Cont.) generate significant commentary in the reports.

worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor." Valley Forge, 454 U.S. at 489. In Valley Forge, a majority of the Supreme Court, including Justice Powell, reaffirmed that "[t]his philosophy has no place in our constitutional scheme." Id. At bottom, it is Judge Bork's agreement with the Supreme Court majority on this and other issues concerning the role of the federal courts that enrages Public Citizen.

Far from showing that he is outside the mainstream of judicial opinion, Judge Bork's record and opinions on issues touching the role of the federal courts prove that his views are entirely compatible with what the Supreme Court itself has said and done. To confirm that this is so, it is necessary to begin by examining the Supreme Court's decisions concerning the fundamental limits on the role of the federal courts. Only then can Judge Bork's views be compared with those the Court has adopted and with those of Justice Powell. Public Citizen, it should be noted, makes no attempt at such a comparison. As will soon become clear, that omission was not inadvertent.

In what follows, we examine Judge Bork's record in cases raising issues of standing, sovereign immunity, and preclusion of review: the common thread uniting these topics is the role of the federal courts vis-a-vis other governmental institutions. We put to one side cases concerning statutes of limitations and attorney's fees, for these generally involve straightforward matters of statutory interpretation and only indirectly concern the role of the federal courts.

I. Standing

In Flast v. Cohen, 392 U.S. 83, 100 (1968), the Warren Court asserted that standing "does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government." Shortly after his appointment to the Supreme Court in 1971, Justice Powell vigorously disagreed with this view of standing (United States v. Richardson, 418 U.S. 166 (1974) (Powell, J., concurring)):

> Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.

418 U.S. at 188.

The majority opinions in Richardson and its companion case, Schlesinger v. Reservists Committee to Stop The War, 418 U.S. 208 (1974), written by Chief Justice Burger and joined by Justice Powell, indicated that the theme Justice Powell sounded immediately found a receptive audience. See Richardson, 418 U.S. at 179 (noting that "the Founding Fathers" did not intend to "set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts"); Reservists, 418 U.S. at 227 ("The proposition that all constitutional provisions are

enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries"). In a series of cases over the next 10 years, the Supreme Court made it increasingly clear that Justice Powell's concern with separation of powers was indeed an integral part of its standing analysis. As Justice Powell stated for the Court in Warth v. Seldin, 422 U.S. 490, 498 (1975), both the constitutional and "prudential" standing requirements are "founded in concern about the proper -- and properly limited -- role of the courts in a democratic society." Id. at 498. See also Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).

This shift toward a more restrictive standing requirement based on separation of powers concerns culminated in Allen v. Wright, 468 U.S. 737 (1984). Justice O'Connor's opinion for the Court, joined by Justice Powell, flatly posited that "the law of Art. III standing is built on a single basic idea -- the idea of separation of powers." Id. at 752. The Court's opinion relied on and quoted approvingly from Judge Bork's concurring opinion in Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-1179 (D.C. Cir. 1983):

> All of the [case-or-controversy] doctrines that cluster about Article III -- not only standing but mootness, ripeness, political question, and the like -- relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

Allen, 468 U.S. at 750.

It should be noted that Allen v. Wright necessarily means that the Vander Jagt majority, which had said that the Supreme Court "does not mean to have separation-of-powers controversies resolved under the rubric of standing," id. at 1169, was wrong on this crucial issue -- and that Judge Bork was right. Vander Jagt also illustrates Judge Bork's indifference to political considerations. He urged denial of standing to Republican congressmen suing the Democratic leadership. More generally, as the foregoing history suggests, Judge Bork, like the Supreme Court majority led by Justice Powell, has attended carefully to the separation-of-powers implications of recognizing particular theories of standing. Like Justice Powell, Judge Bork's concern in each standing decision has been to find the proper constitutional balance between judicial restraint and judicial review. Public Citizen claims that Judge Bork has an "extremely restrictive view of standing, which would exclude from the federal courts many plaintiffs who are currently permitted to pursue their claims." (Public Citizen, at 83) But as Public Citizen is well aware, important and "restrictive" Supreme Court standing decisions such as Valley Forge and Allen v. Wright were decided by 5-4 votes, with Justice Powell in the majority. Public Citizen's real quarrel is with that Supreme Court majority, and its real agenda is to oppose any nominee who cannot be counted on to shift the Court in the direction Public Citizen favors.

As Public Citizen recognizes, Judge Bork's dissent in Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), provides the fullest exposition of his views concerning standing and the separation-of-powers considerations that properly inform standing analysis. The picture that emerges is hardly that of an extremist.

The plaintiffs in Barnes were various members of Congress and the Senate itself, who challenged a presidential "pocket veto" as invalid under the "pocket veto" clause of the Constitution. Unlike the plaintiffs in The Pocket Veto Case, 279 U.S. 655 (1929), the congressional plaintiffs did not base their standing on a concrete injury of the kinds that traditionally have been recognized as judicially cognizable. Instead, they relied on a theory that had never even been advanced until the 1970's, see Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), and that has yet to be reviewed by the Supreme Court. See Burke v. Barnes, 107 S. Ct. 734 (1987) (vacating Barnes v. Kline as moot without reaching the issue of standing). According to this theory, action that diminishes or nullifies a legislator's influence or official powers (such as the power to vote on legislation) constitutes an injury that gives the legislator standing. Relying on previous cases (including Vander Jagt) in which the District of Columbia Circuit Court of Appeals had ruled that congressional plaintiffs had standing based on one version or another of this theory of "congressional standing," the majority held that the President's attempted "pocket veto" was ineffective to prevent the vetoed bill from becoming a law. Barnes, 759 F.2d at 41.

Judge Bork dissented. After a detailed examination of Supreme Court precedent, of historical materials concerning the intent of the Framers of the Constitution, and of the likely consequences of recognizing this theory of "governmental standing," Barnes, 759 F.2d at 44, Judge Bork concluded that "no officers of the United States, of whatever Branch, exercise their governmental powers as

personal prerogatives in which they have a judicially cognizable private interest." Barnes, 759 F.2d at 50 (emphasis added) (quoting Moore v. House of Representatives, 733 F.2d 946, 959 (D.C. Cir. 1984 (Scalia, J., concurring), cert. denied, 105 S. Ct. 779 (1985)). He explained that "the rationale which underlies congressional standing doctrine also demands that members of the Executive and the Judicial Branches be granted standing to sue when their official powers are allegedly infringed by another branch or by others within the same branch." Barnes, 759 F.2d at 43. The result, he argued, would be "general, continual, and intrusive judicial superintendence of the other institutions in which the Framers chose to place the business of governing." Id. at 61.

Public Citizen cites Barnes as one of a number of cases in which Judge Bork has supposedly "advocated the supremacy of the executive branch over the legislative and judicial branches." (Public Citizen at 105, 112-13). This is nonsense. As Public Citizen recognizes, id. at 111, Judge Bork's central contention was that to allow this theory of governmental standing would unconstitutionally increase the power of the judiciary at the expense of both Congress and the President -- and therefore, ultimately, at the expense of the people of the United States. At the conclusion of this dissent, quoting Justice Powell, Judge Bork wrote:

> The legitimacy, and thus the priceless safeguards of the American tradition of judicial review may decline precipitously if such innovations are allowed to take hold.
>
> "[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or

> all citizens. The irreplaceable value of the power articulated by Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests."
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> United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring). Yet when federal courts approach the brink of "general supervision of the operations of government," as they do here, the eventual outcome may be even more calamitous than the loss of judicial protection of our liberties. Gradually inured to a judiciary that spreads its powers to ever more aspects of governance, the people and their representatives may come to accept courts that usurp powers not given by the Constitution, courts that substitute their discretion for that of the people's representatives.

Barnes, 759 F.2d at 71.

Public Citizen makes no effort to establish that Judge Bork's arguments in Barnes are flawed. It does, however, imply that Justice Powell would have sided with the Barnes majority, which invoked his separate opinion in Goldwater v. Carter, 444 U.S. 996, 997 (1979). See also A. Lewis, Bork on the Presidency, New York Times, August 27, 1987. In Goldwater, the court of appeals held that members of Congress had standing to sue the President for unilaterally terminating a defense treaty with Taiwan, but ruled in favor of the President. 617 F.2d 697 (D.C. Cir. 1979) (en banc). The Supreme Court held that the suit should be dismissed, but there was no majority for any one rationale. Four Justices thought that the case presented a nonjusticiable political question that could never be decided by the courts. 444 U.S. at 1002. Justice Powell made a fifth vote to dismiss, but he argued that the case was "not

ripe for judicial review," and rejected the view that it presented a political question. Id. at 997. None of the Justices directly addressed the standing issue. It is therefore difficult to predict with any confidence how any of them, including Justice Powell, would have resolved that issue.

Nonetheless, in explaining his belief that the suit was not ripe for review, Justice Powell did indicate that while members of Congress should not have standing to challenge the President, Congress itself might be able to do so. He stated that "[t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict." Goldwater, 444 U.S. at 997. Conversely, he suggested that "[i]f the President and the Congress had reached irreconcilable positions," the Supreme Court should "provide a resolution pursuant to our duty 'to say what the law is.'" Id.

It may be that, even were he to have been presented with the historical evidence, the separation-of-powers arguments, and the reasoning from precedent on which Judge Bork's dissent in Barnes was based, Justice Powell would have adhered to the position he tentatively expressed in Goldwater. But there is certainly no reason to assume that this is so -- especially since the Court decided Goldwater without the benefit of full briefing and oral argument. See 444 U.S. at 1006 (Blackmun, J., dissenting in part).

In any event, it is clear that Justice Powell and Judge Bork share a perception that the courts should not routinely adjudicate disputes between the Congress and the President at the behest of "small groups or even individual Members of Congress." That fact alone should dispel any inference that there is a wide gulf on this issue between Judge Bork's views and those of Justice Powell.

Public Citizen also claims that Judge Bork's position in Barnes may bar "many lawsuits brought by environmental, consumer, civil rights, and other public interest organizations" because those suits "are essentially disputes between the executive and legislative branches of government." (Public Citizen, at 87) This charge is yet another partisan misrepresentation. Neither his Barnes dissent nor any of his other standing opinions indicates that Judge Bork would deny standing to "public interest organizations" seeking to challenge action by administrative agencies on this spurious ground.

Every case in which any plaintiff claims that the executive branch has acted unlawfully involves "the interests of Congress" in the sense that Congress' legitimate exercise of its lawmaking powers is to some extent frustrated whenever the executive branch violates, misinterprets or misapplies an Act of Congress. Therefore, the real meaning of the Public Citizen suggestion is that Judge Bork believes (or that his opinions logically imply) that no one can challenge allegedly unlawful conduct by the executive branch -- even if that conduct directly deprives a person of liberty, property, or any other interest that would ordinarily support standing. This innuendo about a distinguished jurist who

has joined and written literally scores of decisions in which plaintiffs were allowed to challenge the actions of the executive branch is little short of astonishing.

Furthermore, it is a measure of their advocate's perspective that the Public Citizen is willing to suggest that Judge Bork would justify this bizarre result on the grounds that the plaintiff's interest coincides with the interest of Congress. Any such justification presupposes that persons who would otherwise have standing lose their standing because someone else, whose interest coincides with theirs, lacks standing to begin with. In fact, there is no such rule: "the standing inquiry requires" the court "to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." Allen, 468 U.S. at 752 (emphasis added).

Beyond that, the Public Citizen suggestion is fundamentally inconsistent with the very proposition for which Judge Bork was arguing: that the theory of governmental standing clashes with the traditional view of standing expressed in the Supreme Court's cases, under which "[t]he respective constitutional powers of Congress and the President" can be "given judicial definition," but "only when a private party, alleging a concrete injury, actual or threatened, br[ings] those powers necessarily into question." Barnes, 759 F.2d at 42. Indeed, Judge Bork explicitly noted that it is "entirely appropriate" that "[m]any of the constitutional issues that congressional or other governmental plaintiffs could be expected to litigate would in time come before the courts in suits brought by private plaintiffs who had suffered a direct and

cognizable injury." Id. at 61. The suggestion that Judge Bork really means that no plaintiff could ever raise those issues, because such suits are "essentially disputes between the executive and legislative branches of government," (Public Citizen, at 87), is disingenuous at best.

More generally, Public Citizen repeatedly insinuates that Judge Bork's standing analysis is "one-sided," (Public Citizen at 88), favoring business and discriminating against "environmental, consumer, and civil rights groups." Id. at 83. But some of the very cases Public Citizen discusses refute this insinuation. For example, in Citizens Coordinating Committee v. Washington Metropolitan Area Transit Authority, 765 F.2d 1169 (D.C. Cir. 1985) -- another of the unanimous decisions Public Citizen analyzes where it perceives some rhetorical advantage in doing so -- Judge Bork held that a corporation had no standing to sue based on an aesthetic injury, even though he acknowledged that an individual could do so under the Supreme Court's decision in Sierra Club v. Morton, 405 U.S. 727 (1972). His reasoning hardly reveals a reflexive pro-corporate bias:

> Aesthetic injury presupposes the ability to sense one's surroundings. . . . Though a corporation is a person for some purposes, we would be most reluctant to hold that it has senses and so can be affronted by deteriorations in the environment. That is beyond the reach of legal fiction and belongs in the realm of poetic license.[146]

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146 As in the poem, CORPORATE ENTITY

* * * * *

The Oklahoma Ligno and Lithograph Co.
Weeps at a nude of Michael Angelo.

A. MacLeish, Collected Poems 1917-1952, at 22

In Northwest Airlines, Inc. v. Federal Aviation Administration, 795 F.2d 195 (D.C. Cir. 1986), Judge Bork, for a unanimous panel including Judges Mikva and Swygert (both generally regarded as liberal), ruled that an airline lacked standing to challenge the FAA's decision authorizing one of its former pilots (who had been fired for flying while intoxicated) to resume flying. Judge Bork held that "[e]ven if he is employed elsewhere, the possibility that he will fly in areas in which Northwest maintains routes and actually cause injury to Northwest's passengers and crew is too remote and speculative to constitute injury." Id. at 201. Further, in discussing Justice Blackmun's decision in Diamond v. Charles, 106 S. Ct. 1697 (1986), on which he relied on this issue, Judge Bork noted that an alleged "loss of business" would not suffice to confer standing if "the likelihood of any injury actually being inflicted was too remote to warrant the invocation of the judicial power." Id. at 202. It is surprising, therefore, that Public Citizen cites Northwest Airlines as proof that Judge Bork takes a more restrictive view of business standing "where the business has relied on non-economic interests as a basis for standing." (Public Citizen, at 89)

Public Citizen also strives to create the impression that in case after case Judge Bork's rulings on standing have left plaintiffs with no means to redress their grievances. This impression is misleading in two respects. First, as the Supreme Court noted in Richardson, "that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen

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[146] (Cont.) (Boston, Houghton Mifflin (1953)).

. . . . Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls." 418 U.S. at 179. The notion that Members of Congress or the United States Senate lack political means to vindicate their governmental powers is, of course, even more inaccurate. See Barnes, 759 F.2d at 45, 55 (Bork, J., dissenting).

Second, in many cases the plaintiff has some alternative judicial remedy to a suit that fails to satisfy the standing requirement. For example, in California Association of the Physically Handicapped v. Federal Communications Commission, 778 F.2d 823 (D.C. Cir. 1985), Judge Bork joined Judge Ruth Bader Ginsburg's opinion (over dissent by Judge Wald) holding that an association of handicapped persons lacked standing to challenge the FCC's grant of an application to transfer ownership of a television company's stock. The basis for the court's holding was that the alleged injury -- the company's failure adequately to serve the handicapped -- was not caused by the transfer. Id. at 826-827. As the court pointed out, however, "[t]he Association's complaint is properly and pointedly raised in a license renewal proceeding where, if it is borne out, the Commission could provide effective relief in the form off a refusal to renew the license." Id. at 826 (footnote omitted).

Similarly, in Bellotti v. Nuclear Regulatory Commission, 725 F.2d 1380 (D.C. Cir. 1983), Judge Bork's majority opinion ruled that the Attorney General of Massachusetts lacked statutory authorization to intervene in a proceeding to enforce an NRC order

modifying the license of a nuclear plant located in Massachusetts. The basis for the ruling was simply that, as defined by the NRC, the proceeding in which the Attorney General sought to intervene was narrowly defined so that it did not affect the interests represented by the Attorney General. Id. at 1382. Judge Bork pointed out, however, that the Attorney General "is in no sense left without recourse by the NRC's denial of intervention in the Boston Edison proceeding. Commission regulations provide for public petitions to modify a license, which may lead to license modification proceedings if the Commission finds that appropriate." Id.

These observations, of course, are not meant to suggest that there will not be cases in which faithful application of the Supreme Court's Article III standing jurisprudence bars would-be plaintiffs from obtaining a judicial hearing. But that is a necessary consequence of a firm standing doctrine:

> As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than at any period of our national development. The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a "personal stake in the outcome," or a "particular, concrete injury," or a "direct injury;" in short, something more than "generalized grievances." Richardson, 418 U.S. at 179-80 (citations omitted).

In the last analysis, it is the Supreme Court's insistence on this "basic principle," and Judge Bork's fidelity to it, with which Public Citizen disagrees.

II. Sovereign Immunity

Public Citizen sets the stage for its discussion of sovereign immunity with this pronouncement: "Because the doctrine of sovereign immunity stems from an antiquated, imperial view of governmental power, the Supreme Court has, over the past fifty years, regarded it with disfavor and liberally interpreted congressional waivers of immunity." (Public Citizen, at 92) No case is cited for this statement, which is offered as a description of all three branches of sovereign immunity: the sovereign immunity of States in federal court under the Eleventh Amendment, federal sovereign immunity, and foreign sovereign immunity.

The Supreme Court's cases tell quite a different story. As to federal sovereign immunity, the settled rule is that "a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.'" United States v. Testan, 424 U.S. 392 (1976)(quoting United States v. King, 395 U.S. 1, 4 (1969)). As to Eleventh Amendment immunity, the Supreme Court has held that a waiver by the State should be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" Edelman v. Jordan, 415 U.S. 651, 673 (1974). Congress can abrogate the States' Eleventh Amendment immunity pursuant to its power to enforce the Fourteenth Amendment, but, as Justice Powell wrote for the Court in Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985), "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute in itself." Indeed, only last Term the Court, with Justice Powell writing for four Justices and Justice Scalia concurring, overruled

Parden v. Terminal Railway, 377 U.S. 184 (1964), to the extent that decision was "inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language." Welch v. State Dep't of Highways and Public Transportation, 107 S. Ct. 2941, 2948 (1987).

It is apparent, then, that Public Citizen's assessment of Judge Bork's record on issues of sovereign immunity is premised on a view of the law as Public Citizen wishes it were, not as it is. That view is openly hostile to sovereign immunity as a majority of the Supreme court understands it. Furthermore, as in the case of standing doctrine, Justice Powell has been a staunch defender of sovereign immunity doctrines. For example, in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 116 (1984), Justice Powell writing for the Court rejected the dissent's "view that the Eleventh Amendment and sovereign immunity 'undoubtedly ru[n] counter to modern democratic notions of the moral responsibility of the State:" (quoting id. at 164 n.48)(Stevens, J., dissenting). He explained:

> Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system . . . . As Justice Marshall well has noted, '[b]ecause of the problems of federalism inherent in making one sovereign appear against its will in the courts of another, a restriction upon the exercise of federal judicial power has long been considered to be appropriate in a case such as this' . . . . Accordingly, in deciding this case we must be guided by '[t]he principles of federalism that inform Eleventh Amendment doctrine.'

Id. at 99-100 (citations omitted).

Judge Bork's opinion for a unanimous panel in Morris v. Washington Metropolitan Area Transit Authority, 781 F.2d 218 (D.C. Cir. 1986),[147] held that an agency created by a compact between Maryland, Virginia, and the District of Columbia, and consented to by Congress, has sovereign immunity "because the signatories have successfully conferred their respective sovereign immunities upon it." Id. at 219. His opinion carefully assessed the relevant Supreme Court precedent, and concluded: "[W]here an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency." Id. at 227. That conclusion correctly reflects one established implication of the "principles of federalism" Justice Powell reaffirmed in Pennhurst, where he noted that "we have applied the Amendment to bar relief against county officials 'in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the state itself.'" 465 U.S. 123 n.34 (citation omitted).

Public Citizen criticizes Judge Bork's opinion (joined by liberal Judge Bazelon) in Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984), on the same grounds advanced by Judge Edwards in his dissent: that the majority had disregarded the "clear terms" of a federal statute and relied on "policy grounds." Id. at 844. But that argument is unpersuasive. The

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[147] Judge Wright joined "Judge Bork's fine opinion" but added a brief concurrence of his own. 781 F.2d at 228.

issue in Persinger was whether, in enacting the Foreign Sovereign Immunities Act, Congress "intended to give courts in this country competence to hear suits against foreign states for torts committed on United States embassy premises abroad." Id. at 839. The Act gave the courts jurisdiction over torts by a foreign state "occurring in the United States," and defined United States as "all territory and waters, continental and insular, subject to the jurisdiction of the United States." Id. at 838. The majority reached the quite reasonable conclusion that the phrase "continental and insular" was "intended to restrict the definition of the United States to the continental United States and such islands as are part of the United States or are its possessions." Id. at 839. Thus, even though the United States had "some jurisdiction over its Embassy in Iran," the Act did not apply. While this issue is close enough that reasonable minds could differ in resolving it, Judge Bork's opinion obviously did not disregard the "clear terms" of the law.

Public Citizen decries Judge Bork's dissent in Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987), as a "far-reaching defense of the doctrine of sovereign immunity." (Public Citizen, at 93) Apart from the fact that Public Citizen would, but for the exigencies of the moment, undoubtedly describe Justice Powell's sovereign immunity opinions in Pennhurst, Astascadero and Welch in those very terms, it is clear that Judge Bork's dissent was a conscientious and thoughtful effort to grapple with seemingly inconsistent pronouncements by the Supreme Court as to the interplay between federal sovereign immunity and judicial review of

constitutional claims against the federal government. On the one hand, the Supreme Court "continues to adhere to the rule, even where a constitutional claim is asserted, that '[w]hen the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction.'" Bartlett, 816 F.2d at 718-719 (Bork, J., dissenting)(quoting United States v. Mottaz, 106 S. Ct. 2224, 2229 (1986)). "On the other hand, this clear rule may have been cast into doubt by the Court's remark in [Johnson v.] Robison that a construction of a statute that 'bars federal courts from deciding the constitutionality of veterans' benefits legislation ... would, of course, raise serious questions concerning the constitutionality of the statute. 415 U.S. [361,] 366 [(1974)]." Bartlett, 816 F.2d at 719 (Bork, J., dissenting). Whether one agrees or disagrees with Judge Bork's fully considered resolution of this tension -- that the statement in Robison should not be treated as controlling -- it is clear that the tension exists. Moreover, Judge Bork's reasoning demonstrates that he ought to resolve that tension in a principled manner that displays his concern for stare decisis and for careful evaluation of precedent:

> Lower courts . . . do not usually infer silent overruling when the Supreme Court gives no explicit indication that it has addressed an issue and that such overruling is intended. I think it safer for lower court judges to continue to respect established doctrine, particularly when that doctrine is as old and solidly rooted as sovereign immunity. In addition, the cases cited by the Robinson Court for its aside about constitutionality do not address at all the subject of sovereign immunity. Under these circumstances, the implication of a momentous yet tacit change in the law seem much too tenuous to be acted upon.

Bartlett, 816 F.2d at 719.

This, we submit, is not the sort of reasoning on which charges of extremism should be based. Of course, those who believe such congressional enactments to be unfair and unconstitutional need not rely on Judge Bork to do away with them. They could follow the more direct and traditional source of simply repealing the statute.

III. Preclusion of Review

Public Citizen claims that Judge Bork has "attempted to make it far more difficult for persons to challenge government actions under the Administrative Procedure Act." (Public Citizen, at 96) Two cases are deployed in support of this charge: Gott v. Walters, 756 F.2d 902 (D.C. Cir. 1985), and Robbins v. Reagan, 780 F.2d 37 (D.C. Cir. 1985). In Gott, Judge Bork joined an opinion by then-Judge Scalia, who is hardly an extremist in these matters and who was unanimously confirmed by the Senate as a Supreme Court Justice one year ago. Judge Scalia's opinion is a carefully reasoned application of the rule that, notwithstanding the general presumption of reviewability under the Administrative Procedure Act, a court's role "is not to devise plausible ways of depriving statutory language of its apparent meaning, but rather to give honest effect to the 'fairly discernible' intent of congress to preclude judicial review." 756 F.2d at 916. See Block v. Community Nutrition Institute, 467 U.S. 340, 349 (1984).

Public Citizen's attack on Judge Bork's partial dissent in Robbins reveals far more about Public Citizen's hostility to

Supreme Court precedent than about Judge Bork's views on preclusion of judicial review. Public Citizen claims that the point of disagreement between Judge Bork and the majority was whether the Supreme Court's decision in Heckler v. Chaney, 105 S. Ct. 1649 (1985), was applicable "outside the context of agency enforcement decisions." (Public Citizen, at 97) According to Public Citizen, "[c]ontrary to the narrow reading which most courts have given to Chaney, Judge Bork argued that it should be construed broadly to preclude judicial review of agency decisions that are far afield from the enforcement context." Id.

Chaney, it should be recalled, is the case in which, over a dissent by Judge Scalia, the D.C. Circuit "reached the implausible result that the FDA is required to exercise its enforcement power to ensure that States only use drugs that are 'safe and effective' for human execution." 105 S. Ct. at 1654. The Supreme Court unanimously reversed, holding that "an agency's decision to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion," and therefore should not be presumed to be reviewable under the Administrative Procedure Act because there is no "law to apply." Id. at 1656.

Far from disagreeing with Judge Bork about the meaning or reach of Chaney, the majority in Robbins agreed that Chaney is controlling in any situation where "a court would have no meaningful standard against which to judge the agency's exercise of discretion." Id. at 44 (quoting Chaney). The point of disagreement concerned which issues were properly before the

court. Judge Bork contended that the only issue before the court was, in the majority's words, "the plaintiffs' request that we enforce the government's original pledge to make a model shelter" for the homeless. Id. at 46, n.15. The majority expressly stated that as to this "contention that the agency's commitment to create a model shelter constituted a decision to spend far more than $2.7 million, we agree with Judge Bork that there is no law to apply. Since the alleged commitment was not tied to any specific statute or program, we are unable to discern any manageable guidelines controlling the agency's discretion . . . ." Id. Plainly, Public Citizen's hostility to Chaney does not entitle it to rewrite judicial opinions in this manner. Once the case is read correctly, Judge Bork's views on preclusion of judicial review are unexceptionable and well within the mainstream.

H. Nader v. Bork

The Biden report heralds as "one of the most significant events of the Watergate era" Judge Gesell's opinion in Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), but nowhere in the Report's highly selective three-page description is the most significant fact about the decision disclosed: Judge Gesell vacated the decision upon the order of the court of appeals and the case is of no legal consequence. As explained by the Supreme Court, the order to vacate an opinion "eliminates a judgment, review of which was prevented through happenstance," and "prevent[s] a judgment, unreviewable because of mootness, from spawning any

legal consequences."[148]

It is therefore flatly incorrect to refer to Judge Gesell's decision as authority for the proposition that the "discharge of Mr. Cox was illegal."[149] The court of appeals never had the opportunity to review the case because the plaintiffs moved to have the appeal dismissed as moot rather than defending the decision on its merits. That move, coming after the filing of appellate briefs, provides perhaps the clearest indication that the opinion was more an ad hoc expression of political disagreement than a defensible statement of the law.

On the "merits," Judge Gesell concluded that then-Acting Attorney General Bork could not lawfully dismiss Archibald Cox as special prosecutor on October 20, 1973, because of Justice Department regulations then in effect, nor could he lawfully rescind the regulations in order to accomplish the dismissal. Setting aside momentarily the legal incorrectness of the Gesell ruling, it is noteworthy that the other key participants in the Cox firing, including Cox himself, apparently held a contrary view of presidential authority.[150] It has not been seriously suggested that Robert Bork carried out the presidential directive

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[148] United States v. Munsingwear, 340 U.S. 36, 40, 41 (1950) (emphasis added).

[149] Biden Report, at 63.

[150] Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus refused to execute the President's dismissal order, not because they regarded the order as illegal, but because of explicit and implied personal commitments to the Congress upon their confirmations. Special Prosecutor Cox acknowledged at his October 20, 1973 news conference that the President could direct his dismissal, and he expressed the same view during congressional testimony following his discharge. See Special Prosecutor: Hearings Before Senate Comm. on the

to dismiss Cox other than in good faith and with a reasonable belief in the lawfulness of his action.

The Biden report does not attempt to defend the legal analysis in Nader v. Bork -- for obvious reasons. The expansive theory of congressional standing has been expressly rejected in the D.C. Circuit, and it was based at the time on dicta.[151] The case also was moot when decided; a new special prosecutor was already in office, and Professor Cox had explicitly disclaimed any interest in the controversy.[152] Moreover, the court roamed far beyond the bounds of constitutionally-authorized

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150 (Cont.) Judiciary, 93d Cong., 1st Sess. 51 (1973) ("Hearings).

151 The district court dismissed Ralph Nader for want of standing, but held three congressional plaintiffs had standing on the theory that a declaratory judgment would aid them in reviewing pending bills in Congress to set up a special prosecutor by statute, citing Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973). In Harrington v. Bush, 553 F.2d 190, 204-14 (D.C. Cir. 1977), a unanimous court expressly overturned the Mitchell theory of standing as incompatible with Article III of the Constitution. The court further noted that this theory, the sole supporting grounds for standing in Nader, "was dicta and not the holding of Mitchell." Id. Hence, the law could scarcely be more clear that the plaintiffs in Nader had no standing to seek a declaratory judgment of Executive illegality simply because the court's judgment would "bear upon" a matter of legislative concern. See also Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977) (congressional appellant "uncertain how best to take effective legislative action to correct the illegalities he perceives" does not satisfy constitutional requirement of injury).

152 See Hearings at 102, Oct. 31, 1973. The case was filed on October 23, 1973. The Jaworski appointment was announced on November 1, 1973. The Office of Special Prosecutor was recreated by Department of Justice Order on November 2, 1973. Mr. Jaworski was sworn in on November 5, 1973. Hence, when Judge Gesell entered his declaratory judgment on November 14, 1973, there was no live issue for the district court to decide. In fact, the district court made only one argument that the case was not moot: the congressional plaintiffs had a "substantial and continuing interest in this litigation." 366 F. Supp at 106. By this theory, no case is moot. The congressional need for advice does

adjudication, not contenting itself to issue an advisory opinion on the Cox dismissal, but also opining on the inadvisability of special prosecutor legislation then before Congress. Id. at 109.

Judge Gesell's ruling contained two distinct holdings on the merits. He first concluded that the dismissal of Cox could not be accomplished prior to rescission of the regulation setting forth the condition for removal of the special prosecutor. At most, this issue concerned the effectiveness of the Cox dismissal from the evening of Saturday, October 20, until the conclusion of the Columbus Day holiday weekend approximately 60 hours later,[153] when the regulation was explicitly rescinded on the morning of Tuesday, October 23. The point is obviously a highly legalistic one -- Professor Cox called it "technical" during congressional testimony in 1973[154] -- and the scope of presidential power in these circumstances is unclear.[155] Importantly, unlike the cases cited by Judge Gesell, here no party complained of a denial of procedural protections. Cox expressly declined to join the suit and did not seek reinstatement or backpay.

Judge Gesell's second and far more sweeping conclusion was that the rescission on Tuesday, October 23 of regulations

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152 (Cont.) not empower a court to ignore Article III of the Constitution.

153 During his confirmation hearing in 1982, Judge Bork referred to this period as a "36-hour period," and to the day of rescission as "Monday," apparently failing to recollect that the weekend in question included a Monday holiday. Hearings at page 8-9. A similar mistake apparently occurred at the time of the rescission of the regulation, since the rescission order was made retroactively effective to October 21 rather than October 20.

154 See supra, note 5.

155 See P. Kurland, Watergate and the Constitution 97-99 (1978).

appointing Cox and establishing the special prosecutor's office was unlawful. This holding was, and remains, wholly without support in law. Congress had not legislated restrictions on the special prosecutor's removal. To the contrary, the relevant statute authorized the Attorney General to transfer the functions of the special prosecutor's office to the criminal division. 28 U.S.C. §§ 509, 510. Remarkably, Judge Gesell himself referred to the absence of congressionally-imposed restrictions in another part of his opinion, when he rejected plaintiffs' contention that statements made by Attorney General Elliott Richardson at his confirmation hearing had a legally binding effect. Id. at 109. Absent a statute purporting to limit in some way the removal power of the President, there can be no argument that the dismissal of Cox was contrary to law.[156] See Myers v. United States, 272 U.S. 52 (1926) (affirming presidential power to remove superior executive branch officials).

Moreover, the broad delegation of authority to the Attorney General to make department assignments "as appropriate," 28 U.S.C. section 510, as well as the comprehensive vesting of functions, 28 U.S.C. § 509, among other provisions, commits the revocation decision to agency discretion by law. Heckler v. Chaney, 470 U.S. 821, 833 (1985); see also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). As a result,

[156] Under Judge Gesell's interpretation of the law, a subordinate officer of the executive branch may, through regulations conditioning removal, effectively grant tenure to employees of the executive branch and place them beyond the President's supervision and control. An Attorney General could bind not only himself and the President, but future attorneys general and future presidents. The Constitution does not countenance such a

Judge Gesell ought to have ruled that Bork's dismissal of Cox was an unreviewable agency action.

Finally, it should be noted that Judge Gesell's decision in Nader v. Bork represents, ultimately, a statement that the judiciary may overrule presidential personnel decisions simply by branding them "arbitrary and unreasonable." Id. at 108. Such an approach is wholly consistent with the preference of many of Judge Bork's opponents for unfettered judicial discretion and effective judicial hegemony over the two elected branches of government. But it was not the law before Judge Gesell's vacated ruling in Nader v. Bork, nor has it become the law since.

It should not escape notice that the Biden report dwells exclusively upon the obscure Nader v. Bork ruling and avoids completely the central issue of the Cox dismissal and the events that followed it. Given the Biden report's unmistakable bias, the omission serves to confirm the understanding that has emerged from the recent close examination of those events. Robert Bork's decision to carry out the presidential directive to dismiss Cox was a reasonable one which had the salutary purpose and effect of averting a serious disruption in the administration of justice. In the wake of the dismissal, Bork sought successfully to protect the integrity and independence of the Watergate investigation. The prosecution moved forward in the interim and was unimpaired when the new special prosecutor, Leon Jaworski, took over sixteen days later. The Report of the Watergate Special Prosecution Force (at page 11) is instructive:

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156 (Cont.) situation.

The Saturday Night "Massacre" did not halt the work of WSPF, and the prosecutors resumed their grand jury sessions as scheduled the following Tuesday. Bork placed Assistant Attorney General Henry Petersen, head of the Criminal Division, in charge of the investigations WSPF had been conducting. Both men assured the staff that its work would continue with the cooperation of the Justice Department and without interference from the White House. Upon WSPF's request, Judge Sirica issued a protective order to limit access to, and prevent removal of, WSPF files. Despite their anger over Cox's dismissal and their doubts about the future of their office, the staff members, in a series of meetings, decided to continue their work for the time being.

Nevertheless, the dismissal of Cox and the President's refusal to produce the subpoenaed tapes provoked what one White House official called a "firestorm" of public criticism and serious talk of impeachment on Capitol Hill. In an abrupt reversal, the President announced on October 23 that he would comply with the grand jury subpoena and on October 26 that Bork would appoint a new Special Prosecutor who would have "total cooperation from the executive branch." While the President said he would be unwilling to produce additional White House tapes or other evidence that he considered privileged, he placed no restrictions on the new Special Prosecutor's authority to seek such evidence through the courts.

On November 1, the President announced that he would nominate Senator William B. Saxbe as the new Attorney General. Later that day, Acting Attorney General Bork announced his appointment of Leon Jaworski as Special Prosecutor. Jaworski, who was sworn into office November 5, was assured the same jurisdiction and guarantees of independence as Cox, with the additional provision that he could be dismissed, or his jurisdiction limited, only with consent of a bipartisan group of eight Congressional leaders.

Judge Bork's critics would prefer to ignore his significant role in ensuring the integrity and progress of the

Watergate investigation during the critical period in 1973. Fair-minded observors, however, will recognize that Bork demonstrated courage in the face of controversy and an unwavering commitment to the rule of law.

CONCLUSION

In sum, the attacks on Judge Bork mounted by these reports are illegitimate and unwarranted. Their shoddy methodology and analysis seek to characterize a distinguished and fairminded jurist as biased and close-minded. They accomplish this feat by resorting to considerations unrelated to the proper qualifications of a judge. These reports should be dismissed for the propaganda that they are, and should not confuse the debate over Judge Bork's confirmation.

APPENDIX A

STUDY OF JUDGE BORK'S VOTES IN NONUNANIMOUS CASES

Faced with a number of statistical studies providing handy, albeit faulty, information, we here present an alternative analysis of Judge Bork's nonunanimous decisions. This analysis duplicates the methodology of the three studies which purport to present objective statistics. We have, for example, examined only the extremely small and wholly unrepresentative sample of cases employed by their structure -- most nonunanimous cases. We do this to show that, even within this misleading and truncated universe of cases, an entirely different picture of Judge Bork emerges by simply recategorizing and recharacterizing these decisions.

Let there be no mistake. We do not believe anyone should rely on these figures as a basis for assessing Judge Bork. As we have emphasized, any statistical study focusing on particular litigation or preselected substantive categories is inherently arbitrary, slanted and uninformative. On the other hand, because our study replicates the misleading techniques of Judge Bork's opponents, it provides just as much insight as do theirs into his judicial career: i.e., virtually none.

When summarized, the "results" look like this:[1] In

[1] In analyzing Judge Bork's 58 nonunanimous cases, we have excluded two dissenting votes of Judge Bork where the Supreme Court accepted his position on appeal. Sims v. CIA, 709 F.2d 95 (1983), aff'd in part, rev'd in part, 471 U.S. 159 (1985); Community for Creative Non-Violence v. Watt, 703 F.2d 586 (1983),

litigation between individuals or public interest groups and the government, Judge Bork voted for the individual in five cases and for the government in six cases. In five of the six government cases, Judge Bork wrote or joined the majority. In eight of these eleven cases, Judge Bork either voted for the individual or was joined by one or more judges nominated by a Democratic President.

In eight labor cases, Judge Bork sided with the employee or union three times and for the employer or government five times. We have included such "anti-labor" votes as United States v. Paddack, No.. 86-5371 (D.C. Cir. August 7, 1987), where Judge

[1] (Cont.) rev'd, 468 U.S. 288 (1984). We leave it to the reports to explain how the highest form of approval in our legal system is a mark of pro-government or anti-civil rights bias. Like Public Citizen, we have excluded all opinions expressed in denials of rehearing en banc, because such opinions are not fairly comparable to decisions on the merits. The opinion in Wolfe v. Department of Health & Human Services, 815 F.2d 1527, vacated and rehearing granted, 821 F.2d 809 (1987), is not counted because the panel opinion has been vacated pending rehearing en banc. We have updated the study to include all split panel opinions involving Judge Bork issued through August 31, 1987. We exclude three decision in which subsequent action by the court rendered them unanimous. NRDC v. EPA, No. 85-1150 (July 28, 1987); Mississippi Industries v. FERC, 808 F.2d 1525 (1987) ; McGehee v. CIA, 697 F.2d 1095 (1983). Finally, we also excluded Haitian Refugees v. Gracey, 809 F.2d 794 (1987), because Judge Edwards in fact concurred in the judgement, and so in truth it too is a unanimous case.

We have counted each case only once, as did Public Citizen and the students' report. There is no reasonable way to do as the AFL-CIO has done and count some votes twice and some only once. For clarity, we have crafted a number of categories and sub-categories. We do not think it fair, for example to group a denial of standing to congressmen with a denial of standing to a public interest group or a private litigant. Although ultimately all standing doctrine rests on separation of powers principles, those principles are much more clearly offended when one branch of government takes to court against another. Similarly, we have analyzed or grouped together denials of standing based on the ground that courts ought not to interfere with the conduct of

Bork, in dissent, held a 12 day, $12,000 riverboat excursion by a government employee returning from an overseas assignment did not demonstrate a "conscientious effort to minimize the costs of official travel." Such are the fruits of this misguided focus on only who wins and who loses in each case. Judge Bork can no more be said to be anti-labor on the basis of his split decisions than he can be accused of being a union sympathizer based on his unanimous panel decisions.

In cases involving business regulation, Judge Bork voted for a business four times, four times against. In this simple-minded schema, he voted against the aluminum and paper industries efforts to secure lower shipping rates. Norfolk & Western Railway Co. v. United States, 768 F.2d 373 (D.C. Cir. 1985), cert. denied, 107 S. Ct. 270 (1986). He upheld an employee's right to get damages and equitable relief when an employer retaliates for exercising the right of free speech. Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984). Of the four pro-business votes, one was an en banc decision joined by all but two members of the court. Northern Natural Gas v. FERC, Nos. 84-1516, 85-1045 (Aug. 21, 1987) (en banc).

Put simply, these split decisions evidence no pre-set bias by Judge Bork, one way or the other. He upholds a party asserting a first amendment right once, he votes against such parties twice. He allows access by plaintiffs to the court in three cases, and denies or limits access in five cases. In six of these eight access cases, Judge Bork joined the majority (and of

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[1] (Cont.) foreign relations.

these he wrote only one of the opinions). Twice Judge Bork voted against a plaintiff seeking a determination impinging on foreign affairs. Of these, the Supreme Court has agree to review Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir.), cert. granted, 107 S. Ct. 666 (1986), where Judge Bork dissented. And in the other, Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984), Judge Bazelon, a "liberal" judge, joined Judge Bork. Judge Bork twice voted against criminal defendants. This of course ignores his remaining participation in twenty-two unanimous criminal cases in five years on the bench. It conveniently overlooks his vote in United States v. Brown, No. 86-3065, slip op. (D.C. Cir. 1987), to set aside the convictions in one of the longest criminal trials in the history of the District of Columbia because a single juror was dismissed from the case. Judge Bork agreed the action violated defendants' right to a twelve-person jury, notwithstanding the care observed elsewhere in the prosecution of the case.

Finally, lost in the battle of statistics and thumbnail sketches is the process of law, the process of deciding case by case, statute by statute, person by person the proper resolution of a conflict in which both parties perceive themselves to be in the right. The studies are a caricature of the law, not its substance. Fair-minded readers of Judge Bork's decisions will agree. Unfortunately, in the realities of the world, a public cannot devote itself to a close look at his unanimous and majority opinions, where his vision in almost 5/6ths of all

cases he has written represents the law of the D.C. Circuit, and his twenty dissents, a remarkably small figure for any judge five years on the bench, where he records, as all judges do, their sense of what the law ought to be in a given case. Instead the public is told to rely on the efforts of knowledgeable experts.

It is dreary, painstaking work to rebut gross distortion. In the statistical compilation that follows, the AFL-CIO approach is imitated. We hope that exposing the fallaciousness of these slanted statistical studies will return the debate about Judge Bork's qualifications to where it ought never have left -- the five year record on the D.C. Circuit, his four years service as the nation's chief appellate litigator, and fifteen years as professor at the Yale Law School.

I. Total Number of Nonunanimous Determinations on the Merits in Which Judge Bork Participated Analyzed . . . . . 52 cases

II. Cases Involving Rights of Individual/Public Interest Group . . . . . 11 cases

A. Individual/Public Interest Group Rights in which Bork voted for the individual . . . . . 5 cases

1. Church of Scientology of California v. Internal Revenue Service, 792 F.2d 146 (1986) (en banc), cert. granted, 107 S.Ct. 947 (1987)(Judge Scalia for majority, Bork joins) (Wald dissents) (protects taxpayer's right of privacy; upholding IRS refusal to disclose identifying information to FOIA requestor).

2. Kennedy for President Committee v. Federal Election Commission, 734 F.2d 1558 (1984) (Wald, for majority, Bork joins) (Starr dissents) (FEC not authorized to order repayment of full amount of unqualified expenditures).

3. Planned Parenthood Federation of America v. Heckler, 712 F.2d 650 (1983) (Wright, for majority, joined by Edwards) (Bork dissenting in part) (Bork votes with majority upholding Planned Parenthood's challenge to HHS rules limiting teenage access to Family planning).

4. Franz v. United States, 707 F.2d 582, supplemental opinion, 712 F.2d 1428 (1983) (Edwards for majority, joined by Tamm) (Bork votes with majority to reverse district court's refusal to allow non-custodial father to challenge government's permanent holding of father's children pursuant to Witness Protection Program; votes to remand for determination if state law gives cause of action).

5. Cosgrove v. Smith, 697 F.2d 1125 (1983) (Mikva, for majority, joined by Bonsal) (Bork dissenting in part) (Bork permits sex discrimination claim by male D.C. Code violators who may be imprisoned in either federal or D.C. prison).

B. Rights of Individual/Public Interest Groups in which Bork voted for government . . . . . 6 cases

1. Doe v. United States, slip op., No. 84-5613 (6/19/87) (en banc) (R. Ginsburg, for majority which included Bork) (Wald dissents, joined by Robinson, Mikva, and Edwards) (plaintiff sued under Privacy Act to correct allegedly incorrect information from personnel records; majority holds dispute need only be mentioned in record).

2. San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26 (en banc) (1986), cert. denied, 107 S. Ct. 330 (1987) (Bork, for majority, joined by Edwards, Scalia and Starr, in part by Mikva) (Wald dissents) (Bork holds possibilities of earthquake coinciding with nuclear accident so remote APA did not mandate hearing on issue).

3. Black Citizens for Fair Media v. FCC, 719 F.2d 407 (1983), cert. denied, 467 U.S. 1255 (1984) (Bork for majority, joined by Jameson) (Wright dissents) (Bork rejects challenge to FCC deregulation).

4. Greenberg v. FDA, 803 F.2d 1213 (1986) (Wright, for majority, Edwards joins) (Bork dissents from grant in FOIA case of disclosure of commercial information).

5. Dettman v. U.S. Dept. of Justice, 802 F.2d 1472 (1986) (Starr, for majority, Bork joins) (Gessell dissents) (In FOIA suit against FBI, Bork holds suit barred by failure to follow proper procedures).

6. Council of the Blind v. Regan, 709 F.2d 1521 (1983) (en banc) (Wilkey, for majority, Bork joins) (Robinson dissents) (Congress has created no cause of action to challenge the way the U.S. Office of Revenue Sharing handles complaints).

III. Regulation of Business Cases . . . . . 8 cases

A. Cases In Which Judge Bork Votes for a Business . . 4 cases

1. Northern Natural Gas Co. v. FERC, Nos. 84-1516, 85-1045 (Aug. 21, 1987) (en banc) (D.H. Ginsburg, for majority, joined by Edwards, R. Ginsburg, Bork, Starr, Silberman, Buckley and Williams) (Wald dissents, joined by Mikva) (FERC exceeded its authority in imposing revenue-crediting condition on natural gas pipeline service).

2. Middle South Energy v. FERC, 747 F.2d 763 (1984), cert. dismissed, 473 U.S. 930 (1985) (Bork for

majority, Starr joins) (R. Ginsburg dissents in part) (dispute between power companies and intervening municipalities and businesses: Bork holds FERC does not have authority to suspend initial rates).

3. National Soft Drink Association v. Block, 721 F.2d 1348 (1983) (McNichols, for majority, Bork joins) (Secretary of Agriculture held to have exceeded authority in restricting school children from purchasing soda pop during lunch hour).

4. McIlwain v. Hayes, 690 F.2d 1041 (1982) (Bork, for majority, joined by Jameson) (Mikva dissents) (Bork upholds agency's delay of issuance of rules).

B. Cases in which Judge Bork voted against a business . . . . . 4 cases

1. Clark-Cowlitz Joint Operating Agency v. FERC, 798 F.2d 499 (1986) (en banc) (Silberman for majority, joined by Edwards, R. Ginsburg, Bork, Scalia, Starr, Silberman and Buckley) (Robinson concurring) (expressly endorsing correctness of majority opinion) (Wright dissents, joined by Mikva) (business entity denied disclosure because agency meeting specifically concerns participation in a civil action).

2. Norfolk & Western Railway Co. v. United States, 768 F.2d 373, cert. denied, 107 S. Ct. 270 (1986) (Bork for majority, R. Ginsburg joins) (MacKinnon dissents) (Bork votes against aluminum and paper industries in effort to secure lower shipping rates).

3. Reuber v. United States, 750 F.2d 1039 (1984) (Wald, for panel) (Bork concurring) (Starr dissents) (Bork holds employee can get both damages and equitable relief against business where business acted at behest of federal officials to retaliate against employee for exercise of right of free speech).

4. Investment Company Institute v. F.D.I.C., 728 F.2d 518 (1984) (Bork and Scalia, per curiam) (Wright dissents) (Bork votes to deny businesses' challenge to FDIC's decision to end proceedings).

IV. Substantive Constitutional Protections . . . . . 3 cases

A. Cases in which Judge Bork voted to protect a constitutional right . . . . . 1 case

1. Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (1984) (en banc) (Wilkey for majority) (Scalia dissents, joined by Bork) (Bork joined Scalia's dissent that plaintiff has claim for damages based on taking/Federal Torts Claims Act), vacated and remanded 471 U.S. 1113 (1985).

B. Cases in which Judge Bork voted to deny a constitutional claim . . . . . 2 cases

1. Bartlett v. Bowen, 816 F.2d 695 (1987) (Edwards, for majority, Wright joins) (Bork dissents) (Bork argued Congress had not waived sovereign immunity even to allow constitutional challenge to denial of Medicare benefits claim for $286).

2. Brown v. United States, 742 F.2d 1498 (1984) (en banc) (Wright for majority) (Bork dissents, joined by Tamm, Wilkey, Starr) (Bork argued that D.C. notice of claims statute should be "borrowed" to bar federal civil rights claim).

V. Criminal cases . . . . . 2 cases

A. Cases in which Judge Bork voted in favor of the government in a criminal case . . . . . 2 cases

1. United States v. Singleton, 759 F.2d 176 (1985) (Bork, for majority) (Swygert dissents), rehearing en banc denied, 763 F.2d 1432 (1985) (evidence held to be admissible by the appellate court cannot in the same case be suppressed on retrial by the district court).

2. United States v. Byers, 740 F.2d 1104 (1984) (en banc) (Scalia plurality opinion, joined by Bork). (When a defendant admits to murder but raises an insanity defense, the testimony of the examining psychiatrist does not violate the Fifth Amendment privilege against self-incrimination; joins other circuits uniformly rejecting Sixth Amendment claim that lawyer must be present during the examination).

B. Cases in which Judge Bork voted for the criminal defendant . . . . . 0 cases

VI. Cases Where Parties Assert First Amendment Rights . 4 cases

A. Cases in which Judge Bork voted for a party asserting a First Amendment right . . . . . 2 cases

1. Telecommunications Research v. F.C.C., 801 F.2d 501, rehearing denied, 806 F.2d 1115 (1986), cert. denied, 107 S.Ct. 3196 (1987) (Bork for majority, Scalia joins) (MacKinnon dissenting) (panel holds that FCC's so-called "Fairness Doctrine," since abandoned by F.C.C. as contravening the First Amendment, was a Commission policy and not enacted into law).

2. Ollman v. Evans & Novak, 750 F.2d 970 (1984) (en banc) Starr for majority) (Bork concurring) (Robinson, Wright, Wald, Edwards, Scalia dissent) (Bork argues First Amendment must inform determination of what statements are actionable libel in suit against public figure).

B. Cases in which Judge Bork voted against a party asserting a First Amendment right . . . . . 2 cases

1. Finzer v. Barry, 798 F.2d 1450 (1986) (Bork, for majority, joined by Davis) (Wald dissents) (Bork holds law of nations supports municipality's determination that conservative public interest group may not demonstrate within 500 feet of Nicaraguan Embassy), cert. granted, 107 S. Ct. 1282 (1987).

2. White House Vigil for ERA v. Watt, 717 F.2d 568 (1983) (per curiam for Wald and Oberdorfer) (Bork dissents) (majority modifies regulations limiting demonstrators on White House sidewalk, Bork would enforce regulations as written pending trial).

VII. Cases Involving Access to the Courts . . . . . 8 cases

A. Cases in which Judge Bork votes to grant plaintiff's access to court . . . . . 3 cases

1. Weisberg v. Dept. of Justice, 763 F.2d 1436 (1985) (Mikva and Starr per curiam) (Bork dissents) (Bork dissents from majority's denial of petition for rehearing by FOIA claimant; suggests case should be transferred to Federal Circuit, agreeing with petitioner).

2. Jersey Central Power and Light Co. v. F.E.R.C., 810 F.2d 1168 (1987) (en banc) (Bork, for majority) (Mikva dissents, joined by Wald, Robinson, Edwards) (utility entitled to evidentiary hearing on issue whether FERC's rates were "just and reasonable").

3. Bennett v. Bennett, 682 F.2d 1039 (1982) (Bazelon, for majority, Bork joins) (Edwards dissents) (divorced father may sue wife who allegedly kidnapped child for damages in federal court under diversity jurisdiction).

B. Cases in which Judge Bork votes to deny or limit access to the federal court . . . . . 5 cases

1. Schultz v. Crowley, 802 F.2d 498 (1986) (Scalia for majority, joined by Bork) (MacKinnon dissents) (court reverses grant of attorney's fees because case was not "pending" on effective date of Equal Access to Justice Act).

2. Robbins v. Reagan, 780 F.2d 37 (Robinson and Wald, per curiam) (Bork dissents in part) (Bork holds majority did not have jurisdiction to make determination on merits that model shelter for homeless could be closed).

3. California Association of the Physically Handicapped v. F.C.C., 778 F.2d 823 (1985) (R. Ginsburg for majority, Bork joins) (Wald dissents) (holds, public interest group lacks standing to challenge broadcast station's renewal of license).

4. Lombard v. United States, 690 F.2d 215 (1982), cert. denied, 462 U.S. 118 (1983) (MacKinnon, for majority, Bork joins) (R. Ginsburg dissents in part) (Majority affirms district court's decision that United States did not waive sovereign immunity in suit by former servicemen).

5. Gott v. Walters, 756 F.2d 902 (1985) (Scalia for majority, Bork joins) (Wald dissents) (Bork joins Scalia opinion deferring to Congress' preclusion of judicial review in suit by group of veterans), vacated en banc, 791 F.2d 172 (1985).

VIII. Cases Involving Judicial Interference in Foreign Affairs . . . . . 2 cases

A. Cases in which Judge Bork voted against granting access to plaintiff's seeking determination impinging on foreign affairs . . . . . 2 cases

1. Abourezk v. Reagan, 785 F.2d 1043, cert. granted, 107 S. Ct. 666 (1986) (majority by R. Ginsburg, joined by Edwards) (Bork dissents) (Bork argues that State Department and executive branch have power to exclude aliens if alien's entry would be detrimental to public interest).

2. Persinger v. Iran, 729 F.2d 835, cert. denied, 469 U.S. 881 (1984) (Bork, for majority joined by Bazelon) (Edwards dissenting in part) (Bork holds sovereign immunity bars claim for emotional distress by family of former Iranian hostage).

B. Cases in which Judge Bork voted to grant access to plaintiff's seeking determination impinging on foreign affairs . . . . . 0 cases

IX. Cases Involving Suits by Congressman . . . . . 1 case

A. Cases in which Judge Bork voted against court adjudication of political dispute between Congress and Executive . . . . . 1 case

1. Barnes v. Kline, 759 F.2d 21 (1985) (McGowan for majority) (Bork dissents) (Bork finds members of Congress cannot use the courts to settle political disputes)

B. Cases in which Judge Bork voted to adjudicate political disputes between Congress and Executive . . . . . 0 cases

X. Cases Involving a Suit Between a Union/Employee against Executive . . . . . 8 cases

A. Cases in which Judge Bork voted for a union or employee interest . . . . . 3 cases

1. NTEU v. FLRA, 800 F.2d 1165 (1986) (Bork, for majority, joined by Robinson) (Swygert dissents) (Union free to provide better legal representation for members than non-members) (pro-union).

2. Simplex Time Recorder v. Secretary of Labor, 766 F.2d 575 (1985) (Davis, for majority, joined by Bork) (Wald dissenting in part) (uphold agency finding that manufacturer violated safety regulations) (pro-employee).

3. York v. MSPB, 711 F.2d 401 (1983) (Bork, for majority, joined by Wright) (MacKinnon dissents) (Merit Systems Protection Board cannot affirm the dismissal of a postal worker when it fails to explain the basis for its decision or the standards for granting reconsideration)(pro-employee).

B. Cases in which Judge Bork voted for the employers or government . . . . . 5 cases

1. United States v. Paddack, No. 86-5371 (Aug. 7, 1987) (Silberman, for majority, joined by Wald) (Bork dissents) (Bork finds that government employees who spent twelve days and $12,000 on luxury riverboat to travel from New Orleans to St. Louis violated regulations requiring a "conscientious effort to minimize costs of official travel").

2. Restaurant Corp. of America v. NLRB, 801 F.2d 1390 (1986) (Bork, for majority, joined by Scalia) (MacKinnon dissents in part), vacated, Restaurant Corp. of America v. NLRB, No. 84-1475 (Aug. 25, 1987) (MacKinnon, for majority, joined by Mikva) (Bork dissenting in part) (Bork would protect employees against solicitation in the workplace even if company allows solicitation among employees for birthday presents and farewell gifts).

3. AFGE v. FLRA, 778 F.2d 850 (1985) (Wald, for majority, joined by Bork) (Ginsburg dissents) (Rejecting union claim that government labor relations agency must approve a contract even if it is reasonably construed to violate a law, rule, or regulation).

4. Meadows v. Palmer, 775 F.2d 1193 (1985) (Bork, joined by Starr) (Mikva dissents) (Part IV of opinion);

(Mikva, for panel) (Parts I-III of opinion). (Affirming grant of summary judgment by district court that employee reassigned to job at same grade, with same pay and same organizational standing, presents no claim he was reduced in rank).

5. Prill v. NLRB, 755 F.2d 941 (1985), cert. denied sub nom. Meyers Industries v. Prill, 106 S.Ct. 352 (1985) (Edwards, for majority, joined by Wald) (Bork dissents) (Bork finds the NLRB acted reasonably when it defined the statutory term "concerted activities" to refer to conduct "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself").

XI. Applicability of Federal law to states and localities . . . . . 2 cases

A. Cases in which Judge Bork voted to uphold federal law . . . . . 2 cases

1. Bellotti v. NRC, 725 F.2d 1380 (1983) (Bork, for majority, joined by MacKinnon) (Wright dissents) (state attorney general cannot intervene in federal enforcement proceeding when state has no affected interest).

2. Clark-Cowlitz Joint Operating Agency v. FERC, No. 83-2231 (Aug. 11, 1987)(Starr, for majority, which included Bork)(Mikva, dissents, joined by Robinson, Edwards)(federal law upheld over local municipal agency seeking special preference in relicensing hydroelectric power project).

B. Cases in which Judge Bork voted for state . . . . 3 cases

XII. Miscellaneous

A. Cases between private parties . . . . . 2 cases

1. Catrett v. Johns-Manville Sales Corp., No. 83-1694 (Aug. 7, 1987) (Starr for majority, joined by Wald) (Bork dissents) (Bork holds summary judgment appropriate when plaintiff unable to come forward with proof of critical facts after two years of discovery).

2. Northland Capital Corp. v. Silver, 735 F.2d 1421 (1984) (Starr for majority, joined by Bork) (Wald dissents) (in dispute between private parties, Securities Act claim dismissed for lack of standing).

B. Regulatory decisions neither pro- nor anti-business . . . . . 1 case

1. Associated Gas Distributors v. FERC, No. 85-1811 (June 23, 1987) (Williams, for majority, joined by Bork) (Mikva dissenting in part) (remanding FERC order regulating interstate transportation of natural gas).

APPENDIX B

SCHOLARS AND JURISTS WHO HAVE TAKEN POSITIONS SIMILAR TO THOSE OF JUDGE BORK

Proper Approach to Constitutional Interpretation

- **Justice Robert Jackson**, when he was an assistant attorney general in Franklin Roosevelt's Administration some 50 years ago, stated: "'Let us squarely face the fact that today, we have two Constitutions. One was drawn and adopted by our forefathers as an instrument of statesmanship and as a general guide to the distribution of powers and the organization of government . . . . The second Constitution is the one adopted from year to year by the judges in their decisions . . . . The due process clause has been the chief means by which the judges have written a new Constitution and imposed it upon the American people.'" See Cooper & Lund, Landmarks of Constitutional Interpretation, 40 Policy Rev. 10 (1987).

- **Justice John Marshall Harlan** wrote in his dissent to Reynolds v. Sims, 377 U.S. 589, 591 (1964) that when the Court ignores "both the language and history of the controlling provisions of the Constitution" to invalidate laws, its "action amounts to nothing less than an exercise of the amending power."

- **Thomas Cooley**, the eminent constitutional scholar, has written: "In the case of all written laws, it is the intent of the lawgiver that is to be enforced. But his intent is to be found in the instrument itself." Cooley, Constitutional Limitations 89 (7th ed. 1903).

- **Professor Henry Monaghan**, Harlan Fiske Stone Professor of Constitutional Law at Columbia University, writes:

> - "I think it would be an intuitive, widely shared premise that the Supreme Court in 1800 should have accorded interpretive primacy to original intent in ascertaining the 'meaning' of the constitution." Monaghan, Our Perfect Constitution, 56 N.Y. Univ. L. Rev. 353, 37 (1981).

- Professor Raoul Berger, of Harvard, has written that: "[f]rom Francis Bacon on, the function of a judge has been to interpet, not to make law." Berger, "Original Intention" in Historical Perspective, 54 Geo. Wash. L. Rev. 296, 310-11 (1986).

Griswold v. Connecticut

- **Justice Hugo Black**, in his dissent in Griswold v. Connecticut, 381 U.S. 479 (1965), began by flatly stating that: "In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers Harlan, White and Goldberg who, reciting reasons why it is offensive to them, hold it unconstitutional." Id. at 507. Justice Black, however, concluded that: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional." Id. at 510.

- **Professor Philip Kurland** of the University of Chicago has stated that the Supreme Court's decision in Griswold v. Connecticut was a "blatant usurpation of the constitution making function". Kurland, The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 Vill. L. Rev. 3, 25 (1978-79).

Roe v. Wade

- **Professor John Hart Ely** of Stanford wrote soon after Roe was decided that: "The point that often gets lost in the commentary, and obviously got lost in Roe, is that before it can worry about the next case and the case after that (or even about its institutional position) it is under an obligation to trace its premises to the charter from which it derives its authority. A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it." Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L. J. 920, 949 (1973).

- **Professor Philip Kurland** of the University of Chicago has stated that Roe v. Wade was a "blatant usurpation of the constitution making function." Kurland, The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 Vill. L. Rev. 3, 25 (1978-79).

- **Professor Archibald Cox** of Harvard writes: "My criticism of Roe v. Wade is that the Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment . . . . Constitutional rights ought not to be created under the Due Process Clause unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place." Cox, The Role of the Supreme Court in American Government 113-114 (1976).

- **Professor Alexander Bickel**, of Yale Law School, has argued that the Roe Court merely asserted the result it reached, and "refused the discipline to which its function is properly subject." Bickel, The Morality of Consent at 28 (1975).

- **Professor Gerald Gunther** of Stanford Law School has stated: "The bad legacy of substantive due process and of ends-oriented equal protection involves a block to legislative ends, an imposition of judicial values as to objectives. That is something from which the Burger Court is overtly retreating -- as to equal protection at least, though not as to due process, as Roe v. Wade shows." Forum: Equal Protection and the Burger Court, 2 Hastings Const. L. Q. 645, 664 (1975).

Freedom of Speech

- With respect to government regulation of political speech urging lawless action, **Judge Learned Hand** stated that words which counsel violation of the law should not be considered protected speech. In Masses Publishing Co. v. Pattern, 244 Fed. 535 (S.D.N.Y. 1917) (a case involving the interpretation of the Espionage Act of 1917), he stated: "Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of authority in a democratic state." Id. at 540.

- Criticizing the Court's decision in Cohen v. California, **Professor Alexander Bickel** of Yale University made a similar point, noting that "there is such a thing as verbal violence, a kind of cursing assaultive speech that amounts to almost physical aggression . . . ." Bickel, The Morality of Consent 72 (1975).

- In an oft-quoted passage, **Professor Paul A. Freund** wrote: "The truth is that the clear-and-present danger test is an over simplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity, and availability of more moderate controls than those which the state has imposed; and perhaps a specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values." P. A. Freund, On Understanding the Supreme Court 27-28 (1951).

First Amendment Religion Clause Jurisprudence

- Professor Gerard Bradley, of the University of Illinois College of Law, writes: "At least eight of the nine current justices have expressed dismay and exasperation with the Court's church-state doctrine. See Wallman v. Walter, 433 U.S. 229, 255-66 (1976) (where five justices entered separate concurrences or dissents). 'Our decisions in this troubling area draw lines that often must seem arbitrary.' Id. at 262 (Powell, J., concurring in part, concurring in the judgment, and dissenting in part). See also Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J. concurring); Meek v. Pittinger, 421 U.S. 349 (1975) (Rehnquist, J. concurring in the judgment in part and dissenting in part); Committee for Public Education and Religious Liberty v. Nyquist, 412 U.S. 756, 813 (1973) (White, J., dissenting)." Bradley, Imagining the Past and Remembering the Future: The Supreme Court's History of the Establishment Clause, 18 U. Conn. L. Rev. 827 (1986)(emphasis added).

- Professor Leonard Levy writes: "[T]he justices make distinctions [in the Establishment Clause context] that would glaze the minds of the medieval scholastics." The Establishment Clause: Religion and the First Amendment 128 (1986).

The Supreme Court's tests in the Establishment Clause context, Levy argues, "have little to do with decisions; the use of a test lends the appearance of objectivity to a judicial opinion," but "Justices using the same test often arrive at contradictory results." Id. at 129.

- Professor Philip Kurland, of the University of Chicago, writes: "[T]he Constitution has been essentially irrelevant to the judgments of the United States Supreme Court in the areas designated freedom of religion and separation of church and state." The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 Vill. L. Rev. 3 (1978-79).

The cases decided [under the religion clauses] are but examples . . . of the Court's substitution of its judgment for those of the founding fathers." Id. at 4.

The First Amendment's religion clauses "are not reasons for the decisions in the Court's church and state cases, but only an excuse for them." Id. at 14.

"[T]he Court uses the grab bag of history to choose arguments that support positions reached for reasons other than those which it marshals." Id. at 14.

"[T]he three-prong test has resulted in as much confusion and conflict under the establishment clause as the Court's decisions under the free exercise clause." Id. at 18.

- Professor Jesse Choper, Dean of Law, University of California, Berkeley writes: "[T]he Court's separate tests for the Religion Clauses have provided virtually no guidance for determining when an accommodation for religion, seemingly required under the Free Exercise Clause, constitutes impermissible aid to religion under the Establishment Clause. Nor has the Court adequately explained why aid to religion, seeming violative of the Establishment Clause, is not actually required by the Free Exercise Clause." Id. at 674-75.

"Without cataloguing the school aid cases in detail, I think it is fair to say that application of the Court's three-prong test has generated ad hoc judgments which are incapable of being reconciled on any principled basis." Id. at 680.

- Rex E. Lee, former Solicitor General of the United States, writes: "A decent argument can be made that the net contribution of the Court's precedents toward a cohesive body of law over the years [in the religion clause area] has been zero. Indeed, some would say that it has been less than zero, and that we would be further ahead not only in terms of what we can work with, but in terms of what we can understand, if the Court had waited another half century before it began deciding religion clause cases." The Religion Clauses: Problems and Prospects, 1986 B.Y.U. L. Rev. 338 (1986).

- Professor William Marshall, of Case Western Reserve University Law School, writes: "[T]he one salient point upon which academia has reached almost universal agreement is that the policies and principles underlying religion clause jurisprudence have been inadequately explored and inconsistently applied by the judiciary. Too many fundamental tenets of constitutional law have been only summarily announced. Too much of the jurisprudence can be reconciled only by leaps of faith." Introduction (symposium on religion and the law), 19 U. Conn. L. Rev. 697, 698-99 (1986).

- Professor Phillip Johnson, of Boalt Hall School of Law, University of California, Berkeley, writes: "In an important sense, contemporary doctrine has reversed the original understanding and literal meaning of the first amendment. What was intended to keep the federal government (Congress) out of church-state relations has become a mandate allowing the federal government (i.e. the federal courts) to regulate those relations in every detail." Concepts and Compromise in First Amendment Religious Doctrine, 72 Cal. L. Rev. 817-18 (1984).

Reapportionment -- One Man, One Vote

- Professor Alexander Bickel, of Yale University, critically observed: "More careful analysis of the realities on which it was imposing its law, and an appreciation of historical truth, with all its uncertainties, in lieu of a recital of selected historical slogans, would long since have rendered the Warren Court wary of its one-man, one-vote simplicities." Bickel, The Supreme Court and the Idea of Progress 174 (1970).

- Professor Kurland, of the University of Chicago, has written: "Like the cases concerned with the Negro Revolution, the reapportionment cases rested on the equal protection clause. But unlike the racial discrimination cases, the reapportionment cases were concerned more with form than they were with substance. They represent a sterile concept of equality for the sake of equality. Given the premises of 'one man-one vote', and 'one vote-one value,' the Court needed nothing more for its decision than the principle of reductio ad absurdum. There is an element of Catch-22 in the opinions in these cases. The Court has repeatedly said that justifiable deviations from the arithmetical formula will be tolerated, but it has yet to accept any justification proffered." Kurland, Egalitarianism and the Warren Court, 68 Mich. L. Rev. 629, 677 (1970).

- Professor Kurland has also noted that the reapportionment decisions "turned a slogan into a constitutional doctrine: one man-one vote." Kurland, Equal Education Opportunity: The Limits of Constitutional Jurisprudence Undefined, 35 Univ. of Chi. L. Rev. 583, 585 (1968).

Harper v. Virginia Board of Elections

- In Breedlove v. Suttles, 302 U.S. 272 (1937), one of the cases overruled in Harper, the Supreme Court unanimously rejected a constitutional challenge to Georgia's $1 poll tax. Thus, such distinguished jurists as **Charles Evans Hughes, Louis Brandeis, Harlan Fiske Stone, Benjamin Cardozo** and **Hugo Black** agreed with Judge Bork's position on the constitutionality of the tax. According to the Court's unanimous opinion:

> To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. The privilege of voting is not derived from the United States, but is conferred by the State, and, save as restrained by the Fifteenth and Nineteeth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate.

- Similarly, in Butler v. Thompson, 341 U.S. 937 (1951) (per curiam), the other decision overruled by Harper, the Supreme Court rejected by a vote of 8 to 1 a challenge to the constitutionality of the Virginia law struck down in Harper. In addition to **Justice Black**, who again adopted Judge Bork's position, **Justices Felix Frankfurter, Robert Jackson,** and five others rejected the arguments accepted in Harper. **Justice Douglas** was the sole dissenter.

- **Professor Alexander Bickel**, of Yale University, wrote of Harper: "The poll tax, said the Court, is not plausibly related to 'any legitimate state interest in the conduct of elections.' But 'the Court gives no reason,' complained Justice Black in dissent, and it did not." Bickel, The Supreme Court and the Idea of Progress 59 (1970).

- **Professor Archibald Cox**, although praising the result, acknowledges that the Harper Court used "'the Equal Protection Clause . . . to write into the Constitutiion its notions of what it thinks is good governmental policy,'" and that the Court's opinion "seems almost perversely to repudiate every conventional guide to legal judgment." Cox, The Warren Court: Constitutional Decision as an Instrument of Reform 125 (1968).

Katzenbach v. Morgan

- **Justice Lewis Powell, dissenting in** City of Rome v. United States, 446 U.S. 156, 200 (1980), cited Justice Harlan's dissent in Katzenbach v. Morgan approvingly and stated: "The preclearance requirement both intrudes on the prerogatives of state and local governments and abridges the voting rights of all citizens in States covered under the Act. Under §2 of the Fifteenth Amendment, Congress may impose such constitutional deprivations only if it is acting to remedy violations of voting rights."

- **Professor Alexander Bickel** of Yale wrote of Morgan, "if the Court's reasoning is taken seriously, Congress could bestow the vote on these groups, and on any group which it fears may be discriminated against, even though its fears are grounded solely in the fact that the group in question is deprived of the vote. There is then nothing left of any constraint on the power of Congress to set qualifications for voting in state elections. Yet the Court did not purport to vest plenary power in Congress." Bickel, The Supreme Court and the Idea of Progress 63 (1970). He also noted that, "[t]he Court's ground of decision purported to be limited, but was in truth not limitable." Id. at 76.

- **Professor Bickel** further stated: "Nothing is clearer about the history of the Fourteenth Amendment than that its framers rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states so as to render them equal in accordance with its own notions. Rather the framers chose to write an amendment empowering Congress only to rectify inequalities put into effect by the states. Hence the power of Congress comes into play only when the precondition of a denial of equal protection of the laws by a state has been met. Congress' view that the precondition has been met should be persuasive, but it cannot be decisive. Bickel, The Voting Rights Cases, 1966 Sup. Ct. Review 79, 99 (1966) (emphasis added).

Shelley v. Kraemer

- Professor Herbert Wechsler of Columbia Law School wrote: "That the action of the state court is action of the state . . . is, of course, entirely obvious. What is not obvious, and is the crucial step, is that the state may properly be charged with discrimination when it does no more than give effect to an argument that the individual involved is, by hypothesis, entirely free to make. Again, one is obliged to ask: What is the principle involved?" Weschler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 29 (1959).

- Professor Louis Henkin, then of the University of Pennsylvania, also noted the lack of neutral basis for Shelley: "Shelley v. Kraemer was hailed as the promise of another new deal for the individual -- particularly the Negro individual -- but students of constitutional law were troubled by it from the beginning. Those alert to the responsibility of the Court to afford principled decision, justified by language, history, and other considerations relevant to constitutional adjudication, were disturbed by an opinion of the Court which, to them, did not 'wash'." Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 Univ. of Penn. L. Rev. 473,474 (1962).

- Professor Laurence Tribe, of the Harvard Law School, stated that Shelley's reasoning, "consistently applied, would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement." Tribe, American Constitutional Law 1156 (1978).

Racial Quotas

- **Justice John Paul Stevens** wrote in dissent in Fullilove v. Klutznick 448 U.S. 448, 537, 539 (1980): "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification . . . . For if there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members."

- **Justice Antonin Scalia** has written of quotas: "If that is all it takes to overcome the presumption against discrimination by race, we have witnessed an historic trivialization of the Constitution. Justice Powell's opinion [in Bakke] . . . is thoroughly unconvincing as an honest, hardminded, reasoned analysis of an important provision of the Constitution . . . . [T]he racist concept of restorative justice . . . is fundamentally contrary to the principles that govern, and should govern, our society." Scalia, The Disease as Cure: "In order to get beyond racism, we must first take account of race," 1979 Wash. U. L. Q. 147.

- **Justice William O. Douglas** was adamant in his rejection of race-conscious solutions such as quotas. In the first case to come before the Supreme Court involving the allegedly benign use of race to allocate to minorities a certain number of places in a professional school, Justice Douglas stated that person "who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color . . . . The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organizaed . . . . so far as race is concerned, any state-sponsored preference to one race over another . . . is in my view 'invidious" and violative of the Equal Protection Clause." De Funis v. Odegaard, 416 U.S. 312, 333, 342, 343-44 (1974) (Douglas, J., dissenting) (emphasis added).

- **Professor Alexander Bickel**, of Yale University, wrote: "The lessons of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support for equality, they now claim support for inequality under the same Constitution. Yet a racial quota derogates the human

dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice." Bickel, The Morality of Consent 132-133 (1975).

- Similarly, **Professor Philip Kurland**, of the University of Chicago, has written: "not until racial categories are obliterated from our laws can there be even a hope for the realization of equality in our society." Kurland, Bakke's Wake, 60 Chicago Bar Record 66, 69 (1978).

- **Professor Alan C. Dershowitz**, of Harvard Law School, appeared of counsel on an amicus brief filed in support of Alan Bakke's claim of reverse discrimination. The brief concluded that the position advocated by the University of California in support of its racial quotas "sacrifices the principle of racial equality" and contains "no cut-off principle. Though most of the jurisdiction for the position is said to come from an effort to compensate for slavery, there is no limit in the Medical School's action to descendants of slaves; there is no limitation to blacks; the policy includes Mexican-Americans and Asian-Americans -- those who were arguably wronged by the United States and those who came recently. It includes Hispanic-Americans with no real effort to distinguish among them. In short, it uses the grossest sort of stereotypes to decide who 'deserves' an advantage." Brief of American Jewish Committee et al., Amici Curiae, Regents of the University of California v. Bakke, No. 76-811, at 69 (Aug. 1977) (emphasis added).

- **Jack Greenberg, Director-Counsel of the NAACP Legal Defense Fund**, in urging the Supreme Court to invalidate a state statute requiring that a candidate's race be designated on each ballot, argued: "[T]he fact that this statute might operate to benefit a Negro candidate and against a white candidate . . . is not relevant. For, it is submitted the state has a duty under the Fifteenth Amendment and the Fourteenth Amendment to be 'color-blind' and not to act so as to encourage racial discrimination . . . against any racial group." Jurisdictional Statement, Anderson v. Martin, 375 U.S. 399 (1964), at 11-12 (emphasis added).

Quote from Report of the Watergate Special Prosecution Force

The Saturday Night "Massacre" did not halt the work of WSPF, and the prosecutors resumed their grand jury sessions as scheduled the following Tuesday. Bork placed Assistant Attorney General Henry Petersen, head of the Criminal Division, in charge of the investigations WSPF had been conducting. Both men assured the staff that its work would continue with the cooperation of the Justice Department and without interference from the White House. Upon WSPF's request, Judge Sirica issued a protective order to limit access to, and prevent removal of, WSPF files. Despite their anger over Cox's dismissal and their doubts about the future of their office, the staff members, in a series of meetings, decided to continue their work for the time being.

Nevertheless, the dismissal of Cox and the President's refusal to produce the subpoenaed tapes provoked what one White House official called a "firestorm" of public criticism and serious talk of impeachment on Capitol Hill. In an abrupt reversal, the President announced on October 23 that he would comply with the grand jury subpoena and on October 26 that Bork would appoint a new Special Prosecutor who would have "total cooperation from the executive branch." While the President said he would be unwilling to produce additional White House tapes or other evidence that he considered privileged, he placed no restrictions on the new Special Prosecutor's authority to seek such evidence through the courts.

On November 1, the President announced that he would nominate Senator William B. Saxbe as the new Attorney General. Later that day, Acting Attorney General Bork announced his appointment of Leon Jaworski as Special Prosecutor. Jaworski, who was sworn into office November 5, was assured the same jurisdiction and guarantees of independence as Cox, with the additional provision that he could be dismissed, or his jurisdiction limited, only with consent of a bipartisan group of eight Congressional leaders.

Judge Bork's critics would prefer to ignore his significant role in ensuring the integrity and progress c